(30) (34)

Nos. 06-340 and 06-549

FILED
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In The

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*, *Petitioners,*

vs.

DEFENDERS OF WILDLIFE, *et al.*, *Respondents.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioner,*

vs.

DEFENDERS OF WILDLIFE, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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44. 6/21/02 Biological Evaluation on proposed approval of Arizona's NPDES program .... HB Pet. App. 587-620

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DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit

04/03/03	PETITION FOR REVIEW DOCKETED (File date 04/03/03)
05/01/03	FILED HOME BUILDERS' MOTION TO INTERVENE WITH EXHIBITS; SERVED ON 04/29/03 (File date 05/01/03)
05/02/03	FILED STATE OF ARIZONA'S MOTION TO INTERVENE; SERVED ON 05/01/03 (File date 05/02/03)
05/02/03	FILED ARIZONA CHAMBER OF COMMERCE'S MOTION TO INTERVENE SERVED ON 05/01/03 (File date 05/02/03)
05/13/03	STATE OF ARIZONA'S, ARIZONA CHAMBER OF COMMERCE'S AND HOME BUILDERS' MOTIONS TO INTERVENE ON BEHALF OF RESPONDENT IS GRANTED (File date 05/13/03)
08/15/03	PURSUANT TO THE DISTRICT COURT'S 07/17/03 ORDER A PORTION OF THE DISTRICT COURT ACTION HAS BEEN TRANSFERRED TO THIS COURT. THE TRANSFERRED ACTION HAS BEEN ASSIGNED NO 03-72894. NOS 03-71439 AND 03-72894 ARE CONSOLIDATED. (File date 08/15/03)
09/23/03	FILED PETITIONERS' CONSOLIDATED OPENING BRIEF. (File date 09/23/03)
11/06/03	FILED RESPONDENT USEPA'S BRIEF. (File date 11/06/03)

12/19/03	RECEIVED ORIGINAL AND 16 COPIES PETITIONERS' REPLY BRIEF OF 39 PAGES. (File date 12/19/03)
09/02/04	CALENDARED: SAN FRANCISCO NOVEMBER 1, 2004 9:00 A.M. COURTROOM 1 (File date 09/02/04)
08/22/05	FILED OPINION: WE TRANSFER DEFENDERS OF WILDLIFE'S ENDANGERED SPECIES ACT AND ADMINISTRATIVE PROCEDURE ACT SUIT CHALLENGING THE VALIDITY OF THE BIOLOGICAL OPINION TO THE DISTRICT COURT WHERE IT WAS ORIGINALLY FILED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. THE PETITION FOR REVIEW IS GRANTED AND REMANDED TO THE EPA FOR PROCEEDINGS CONSISTENT WITH THIS OPINION (File date 08/22/05)
09/20/05	FILED ORDER (MARSHA S. BERZON) RESPONDENTS' MOTION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR REHEARING OR PETITION FOR REHEARING EN BANC IS GRANTED. THE PETITION SHALL BE FILED NO LATER THAN 10/20/05. (File date 09/20/05)
09/30/05	FILED ORDER (MARSHA S. BERZON) INTERVENORS' MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR REHEARING OR REHEARING EN BANC IS GRANTED. THE PETITION SHALL BE FILED NO LATE THAN 10/20/05. (File date 09/30/05)

10/19/05	FILED INTERVENOR-RESPONDENT PETITION FOR REHEARING EN BANC. (PANEL ALL ACTIVE AND ANY INTERESTED SENIOR JUDGE). (File date 10/19/05)
10/20/05	FILED RESPONDENT USEPA & US FISH AND WILDLIFE SERVICE'S PETITION FOR REHEARING EN BANC. (File date 10/20/05)
11/14/05	FILED ORDER (MARSHA S. BERZON): PETITIONER DEFENDERS OF WILDLIFE IS REQUESTED TO FILE A RESPONSE TO THE PETITION FOR REHEARING EN BANC WITHIN 21 DAYS OF THE DATE OF THIS ORDER. THE RESPONSE SHALL NOT EXCEED 15 PAGES IN LENGTH. (File date 11/14/05)
12/23/05	FILED DEFENDERS OF WILDLIFE'S RESPONSE TO FEDERAL RESPONDENTS AND INTERVENORS-RESPONDENTS' PFR EB OF 22 PAGES; SERVED ON 12/22/05. (File date 12/23/05)
06/08/06	FILED ORDER DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC. (File date 06/08/06)
06/12/06	FILED INTERVENORS' JOINT MOTION TO STAY MANDATE; SERVED ON 06/12/06. (File date 06/12/06)
06/15/06	FILED INTERVENOR STATE OF ARIZONA'S MOTION FOR STAY THE MANDATE; SERVED ON 06/13/06. (06/15/06)
06/15/06	FILED RESPONDENT'S MOTION WITH DECLARATION TO STAY THE MANDATE. (File date 06/15/06)

06/16/06 FILED ORDER (MARSHA S. BERZON) INTERVENOR'S JOINT MOTION TO STAY THE MANDATE IS GRANTED. THE MANDATE IS HEREBY STAYED FOR 90 DAYS PENDING THE FILING OF A PETITION FOR WRIT OF CERTIORARI IN THE U.S. SUPREME COURT. IF SUCH A PETITION IS FILED AND IF THE WRIT OF CERT IS GRANTED BY THE SUPREME COURT THE STAY SHALL CONTINUE UNTIL DISPOSITION BY THE SUPREME COURT. (File date 06/16/06)

U.S. District Court
District of Arizona (Tucson Division)

04/17/02 1 COMPLAINT FILED (File date 4/17/02)

01/09/03 42 SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF BY DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL; ADDING DFT GALE NORTON, STEVEN WILLIAMS. MODIFIED ON 01/27/2003 (ENTERED 01/27/2003). (File date 01/09/03)

01/31/03 49 MOTION TO INTERVENE WITH RESPECT TO CLAIM SEVEN BY NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA. (File date 01/31/03)

01/31/03 50 DECLARATION OF CONNIE WILHELM BY HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA. MODIFIED ON 04/09/2003). (File date 01/31/03)

01/31/03 51 DECLARATION OF ALAN LURIE BY SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION. MODIFIED ON 04/09/2003. (File date 01/31/03)

06/02/03 151 ORDER BY JUDGE CINDY K. JORGENSON DENYING MOTION FOR PRELIMINARY INJUNCTION BY PLAINTIFF; WITHIN TEN DAYS OF THE ENTRY OF THIS ORDER THE PARTIES SHALL ADVISE THIS COURT WHETHER THEY WISH TO PROCEED ON CLAIM 7; AND IF NO TIMELY REQUEST IS FILED THIS COURT WILL SEVER CLAIM 7 PURSUANT TO RULE 21 FED.R.CIV.P. AND TRANSFER IT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PURSUANT TO 28 USC § 1631. (File date 06/02/03)

07/17/03 178 ORDER BY JUDGE CINDY K. JORGENSON RE: COMPLAINT (AMENDED); IT IS HEREBY ORDERED THAT: CLAIM 7 OF PLAINTIFFS' SECOND AMENDED COMPLAINT IS SEVERED FROM PLAINTIFFS' REMAINING CLAIMS, AND TRANSFERRED TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT; THE CLERK OF THE COURT SHALL FORWARD A COPY OF THIS ORDER, THIS COURT'S JUNE 2, 2003 ORDER #151, AND A COPY OF PLAINTIFFS' SECOND AMENDED COMPLAINT #42 TO THE NINTH CIRCUIT; THE NINTH CIRCUIT IS ADVISED THAT THIS MATTER IS A RELATED CASE TO THE PENDING MATTER OF DEFENDERS OF WILDLIFE V. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NINTH CIRCUIT

CASE #03-71439; AND IF ANY PARTY OR INTERVENOR WISHES ADDITIONAL PORTIONS OF THIS COURT'S RECORD TO BE FORWARDED TO THE NINTH CIRCUIT, IT SHALL PREPARE A MOTION AND/OR STIPULATION ALONG WITH A PROPOSED FORM OF ORDER THAT CLEARLY INDICATES WHICH SPECIFIC PORTIONS OF THE RECORD IT WISHES FORWARDED TO THE NINTH CIRCUIT. SUCH MOTION AND/OR STIPULATION ALONG WITH A PROPOSED FORM OF ORDER SHALL BE SUBMITTED TO THE COURT WITHIN 10 BUSINESS DAYS OF THE ENTRY OF THIS ORDER. (File date 07/17/03)

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

In Reply
Refer toWTR-5

January 23, 2002

Mr. David L. Harlow
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Rd.
Suite 103
Phoenix, AZ 85021

Re: Consultation Regarding Possible Environmental Protection Agency (EPA) Approval of Program Delegation of the National Pollutant Discharge Elimination System (NPDES) Program to the Arizona Department of Environmental Quality (ADEQ) and Request for Species List

Dear Mr. Harlow:

The purpose of this letter is to request initiation of informal consultation under Section 7 of the Endangered Species Act regarding the possible approval by the EPA for ADEQ to administer the NPDES program, under the federal Clean Water Act, in Arizona. The approval does not include authorization to administer the NPDES program in Indian Country, as defined in 18 U.S.C. § 1151. The EPA received Arizona's submission for the authority to administer the program on January 14, 2002. Within 90 days of the receipt of a complete program, the EPA Administrator is required to approve or disapprove the

program. If the program is approved, ADEQ would assume the following specific activities:

- Permitting, compliance, and enforcement of individual permits for discharges from industrial, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and, domestic wastewater treatment facilities that include publicly-owned treatment works (POTWs) and privately-owned treatment works;
- Issuance of general permits;
- Administration of the NPDES sludge (biosolids) management program;
- Administration of the NPDES pretreatment program;
- Administration of all stormwater discharge programs, including municipal storm sewer systems (combined and separate), general permits for stormwater discharges, and individual permits for stormwater only discharges; and
- Administration of the NPDES permitting, compliance, and enforcement programs for federal facilities.

A copy of the Arizona Pollutant Discharge Elimination System (AZPDES) Program Submission is enclosed.

Please provide us with a list of any threatened, endangered, proposed, or candidate species, and designated or proposed critical habitats that might be affected by these actions, and any information, recovery plans, maps, or literature citations of which the Service is aware that may be useful to us in assessing whether these actions may affect listed, proposed, or candidate species or critical

habitats. If you have any questions, please contact Jenny Mann of my staff at (415) 972-3512.

Sincerely,

/s/ Terry Oda
Terry Oda, Chief
CWA Standards and
Permits Office (WTR-5)

Enclosure

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Karen Smith
Director, Water Quality Division
Arizona Department of Environmental Quality
3033 North Central Avenue
Phoenix, AZ 85012-2809

Dear Ms. Smith:

To follow our conference call yesterday, I am writing to confirm that EPA is unable to determine the Arizona Pollution Discharge Elimination System program submission is complete. Based on our review to date, we conclude the submission is incomplete, as it appears Arizona's legal authority may not meet minimum requirements set forth in EPA's state program submission regulations. This conclusion is based on our determination that issues we identified in our letter of September 20, 2001 remain unresolved, and differences between State and federal legal authorities have not been adequately addressed. A list of concerns was included in yesterday's electronic mail message from Matthew Mitchell of our office to you and others at ADEQ.

As we discussed during the conference call, we may have additional concerns regarding the State's authority to implement a complete National Pollutant Discharge Elimination System (NPDES) program, including biosolids and pretreatment. While EPA must, within the first thirty days determine whether the program submission is

complete, the statute provides that EPA will have ninety days to make a final determination as to whether or not the application is approvable. Thus, EPA's initial review to determine whether an application is complete is not intended to be exhaustive, but rather to determine whether the application meets basic legal requirements.

We and the Office of Regional Counsel hope to have productive discussion with your office and the Arizona Attorney General's (AG's) Office on these issues, and how they might be addressed in a complete program submission. We would also like to have a draft revised AG's Statement, which addresses and explains differences between the State and federal authorities, to inform these discussions. The AG's Statement is an essential component for EPA's review of any State NPDES program submission. In certifying that the State program is at least as stringent as the federal program, the AG must demonstrate the State's authority to implement the program, and address any differences between State and federal law, explaining why the State is as stringent as the federal. EPA's NPDES State Program Guidance indicates States will send to EPA a draft application, including a draft AG's Statement, with opportunity for review prior to submittal of a formal application. As we did not receive a draft application, we were unable to provide specific feedback and seek resolution of issues until reaching this first crucial point in the forma review process.

I am confident we will continue to work together to achieve our mutual goal of delegating this program to Arizona, and believe we can resolve the issues before us.

Our lead staff person for the review, Matthew Mitchell, can be reached at (415) 972-3508, and I am at (415) 972-3572.

Sincerely yours,

/s/ Alexis Strauss 15 Feb. 2002
Alexis Strauss, director
Water Division

[Image Omitted In Printing]
Matthew Mitchell
02/28/2002 07:08 PM

To: Jane DeRose-Bamman <DeRose-Bamman.Jane@ev.state.az.us>
cc: nancy.jamison@AG.STATE.AZ.US, Michele Robertson <Robertson.Michele@ev.state.az.us>, Karen Smith <Smith.Karen@ev.state.az.us>, Mike Traubert <Traubert.Mike@ev.state.az.us>, Chris Varga <Varga.Chris@ev.state.az.us>
Subject: AZPDES issues

Jane,

I have attached one file which is a table summarizing the issues. The second file contains a fuller explanation of each issue.

These are the issues we've been able to identify in our review to date in order to comply with your request that we provide you a list of issues as soon as possible. We will continue our review and will notify you immediately if we identify any additional concerns.

We look forward to discussing the NPDES issues with you on Tuesday morning.

Matt

[File Images Omitted In Printing]
Issues Summary228.wp majorissues228.wpc

DRAFT

Arizona Program Submission – Major Issues		
Issue	**Regulatory Citation or Location in Submission**	**Status/ Resolution**
Biosolids Issues		
1. Scope of program (elements missing)	40 CFR 503.1(b) – Applicability ((b)(2) and (4) applicability to sewage sludge and land where sewage applied	
2. Direct enforceability (capability missing)	503.3(b) Direct enforceability	
3. Additional or more stringent requirements (capability limited)	503.5(a) Additional or more stringent requirements	
4. Preparer responsibility (enforcement capability against preparer for applier violation)	503.7 Requirement for a person who prepares sewage sludge	
5. Definition of sewage sludge (definition missing)	503.9(w) definition of sewage sludge	

6. Additional requirements for appliers to protect public health and safety	Subpart B Land Application 503.10 Applicability 503.10(b)(2) and (c)(2) (authority for case-by-case requirements)	
7. Selenium limit waiver	503.13 Table 1 (selenium limit)	
8. Prohibition of ESA adverse effects	503.14(a) (prohibition of adverse effects)	
9. Reclamation site (application of sewage sludge at greater than an agronomic rate)	503.14(d) (permission from permitting authority needed)	
10. Preparer's annual report	503.18 Reporting	
11. Inspection of biosolids management facilities	Resource analysis	
NPDES Issues		
12. Public participation in enforcement actions	123.27(d)	
13. Authority to issue permits to control disposal of pollutants into wells	123.28	

14. Judicial review of approval or denial of permits	123.30	
15. Affirmative defense to civil liability (broader than NPDES provision)	40 CFR 122.3(d) (AZ goes beyond scope) ARS 49-262F	
16. Description of state administrative and judicial review procedures	123.22(c)	Program description needs to be augmented
17. Charity carwash exemption and swimming pools and residential evaporative cooler bleedoff	R18-9-A902.G.8	
18. Definition of Tribal lands	A902.A.1	
19. Definition of navigable waters (State regs lack language comparable to 40 CFR 1222)	49-201	

20. Definition of toxic pollutants (limitation to those "injurious to public health")	49.201.37. There are a number of references throughout the statute and regulations to it. See also 49-255.01(F)	
21. Extent of authority for entry, inspection and sampling, etc. (authority for actual discharges v. for discharges that may occur)	49-203(B) and AG Statement at p. 9	
22. Maximum fines for criminal penalties (less stringent than 40 CFR 123.27?)	A.R.S 13-801, 802, 803. See also AG Statement at page 15	
23. Classification of penalties (as stringent as federal?)	49-263	
24. Prohibitions (applicable water quality requirements may include EPA-promulgated standards)	R-18-9-A903.3	

25. Resources for compliance with storm water regulations, CAFO regulations, and implementation of pretreatment program	Program Description	
26. Assumption that Federal contribution will continue to be 40%	Program Description	

Arizona Program Submission – Major Issues

Biosolids Issues

1. EPA rule: 503.1(b)(2), 1(b)(4): states that the biosolids regulations apply to sludge applied to the land, and to the land where sludge is applied or disposed. Allows for corrective actions to be taken in cases where preparer and applier are not found to be in violation.

ADEQ rule: no similar statement of authority:

2. EPA rule 503.3(b), known as the "direct enforceability" provision, allows enforcement against any person that engages in the use or disposal of sewage sludge without complying with the sewage sludge regulations, regardless of whether that person holds a permit for sewage sludge use or disposal.

ADEQ rule: This provision is missing and should be added or incorporated by reference to allow adequate enforcement of the ADEQ biosolids regulations. If a person does not have a permit and prepares or applies sewage sludge without complying with the regulations, ADEQ should have the ability to hold them liable.

3. EPA rule: 503.5(a): authorizes permitting authority to impose more stringent conditions (on any party) when needed to protect public health and the environment

ADEQ rule: ADEQ can place specific requirements in a permit issued to a wastewater treatment plant. It does not appear that ADEQ has authority to issue a permit to an applier with requirements above and beyond those specifically in ADEQ's rule.

Example: An applier wants to apply out-of-state biosolids in an area near an endangered species habitat. It is

desirable from the point of view of the Fish and Wildlife Service and ADEQ to have a 500' set-back from the habitat. ADEQ has no mechanism to order the applier to observe a 500' set-back in this particular case.

4. EPA rule: 503.7: holds preparer responsible for compliance with all requirements in the rule.

ADEQ rule: ADEQ can place this requirement in permits issued to wastewater treatment plants. It does not appear that ADEQ has authority to take enforcement action against a preparer if an applier violates ADEQ's rule and the preparer does not have a permit placing responsibility on the preparer.

Example: A non-NPDES POTW without a permit with sludge conditions in it contracts with a land applier who applies biosolids in excess of the agronomic rate. Under 40 CFR 503.7, EPA could penalize the POTW as well as the applier. ADEQ could penalize the applier but not the POTW.

5. EPA rule 503.9(w): defines "sewage sludge"

ADEQ rule: This definition was deleted from the final version of the ADEQ rule.

6. EPA rule 503.10(b)(2), 10(c)(2): Allows permitting authority to impose management practices on applications of "exceptional quality" biosolids when necessary to protect public health and the environment.

ADEQ rule: ADEQ could impose additional requirements on a POTW, but does not appear to have authority to impose these on an applier.

Example: An applier registers to apply pasteurized exceptional quality biosolids from a California POTW. Because of the high nitrogen content, it is desirable to require the applier to apply at the agronomic rate in order to ensure groundwater protection. ADEQ does not have a mechanism for requiring the applier to apply at the agronomic rate.

7. EPA rule 503.13 Table 1: Sets a ceiling concentration for Selenium of 100 mg/kg, with no exceptions, and a cumulative load limit of 100 kg/ha.

ADEQ rule: allows ceiling concentration for Selenium greater than 100 mg/kg, and cumulative load greater than 100 kg/ha under certain circumstances. This is essentially a waiver of the selenium limit.

Example: a small POTW that only has to monitor once per year could apply biosolids with very high selenium levels for several months but then take additional samples and meet the ADEQ standards if the average for the year is greater than 100 mg/kg. ADEQ thus could not take enforcement action in what would be a violation of 503.13. There may be an impact from short term effects of high Selenium concentrations.

8. EPA rule: 503.14(a): prohibits application of sewage sludge ***if it is likely*** to adversely affect a threatened or endangered species ***or its designated critical habitat***.

ADEQ rule: Lacks this provision, although it incorporates 503.24(a) by reference, which prohibits the surface disposal of sewage sludge if it is likely to adversely affect a threatened or endangered species or its designated critical habitat. ADEQ states that under its rule, "the issuance of a permit does not authorize any . . . infringement of

federal, state, or local law or regulations." It also notes that "the express or implied approval to use, dispose, or transport under the Articles, falls under the definition of "license" . . . including "the whole or part of any agency permit, certificate, approval, registration". However, these provisions fall short of the prohibition in 503.14(a) because an applier does not have an independent duty to avoid an adverse effect under applicable Federal law, though he has a duty to avoid a "take" under the Endangered Species Act. The current provisions in the ADEQ rule do not appear to give ADEQ authority to take enforcement action if a biosolids application adversely affects a threatened or endangered species. Furthermore, ADEQ does not have authority to take enforcement, under the Endangered Species Act, for impacts to designated critical habitat.

Example: It is found that an applier has razed the critical habitat of an endangered plant species. ADEQ does not have authority to penalize the applier. Further, it would not have the authority to penalize the preparer, as contemplated by 40 CFR 503.7 and explained in the preamble to the sewage sludge regulations.

9. EPA rule: 503.14(d): prohibits application at greater than the agronomic rate, unless, in the case of a reclamation site, it is ***specified by the permitting authority***.

ADEQ rule: The ADEQ rule sets requirements for application at a reclamation site, but does not specifically require an approval from the permitting authority to operate the site as a reclamation site.

10. EPA rule: 503.18: requires POTWs and other Class 1 Sludge Management Facilities to submit annual reports to the permitting authority with the information in 503.17.

ADEQ rule: requires applier to collect this information from the preparer and to submit it in the applier's report. It is unclear whether ADEQ could enforce against POTW if applier fails to provide preparer's report to ADEQ.

11. ADEQ lists as a responsibility conducting inspections of Class 1 Biosolids Management Facilities. It commits to only 5 inspections per year. There are 17 Class 1 facilities in Arizona. It does not commit to any inspections of other majors or minors, when necessary. There are an additional 14 majors which are not Class 1 facilities. A full inventory of minors has not been provided. There is no provision for including inspections of biosolids operations during NPDES inspections of major and minor POTWs.

NPDES Issues

12. 123.27(d): public participation in enforcement actions

State must either allow intervention as of right in any civil or administrative action to obtain remedies (injunctive and penalties) OR provide assurances that it will investigate and provide written responses to all citizen complaints, not oppose intervention, and publish notice and provide at least 30 days comment on proposed settlement of state enforcement action. Could not find.

13. 123.28: state law must provide authority to issue permits to control the disposal of pollutants into wells. AG's statement needs to address.

14. 123.30. Must provide an opportunity for judicial review in state court of the final approval or denial of permits that is sufficient to provide for, encourage and assist public participation in the permitting process. Must be as expansive as §309. Insufficient if narrowly restricts

the class of persons who may challenge the permit decision (e.g., if only permittee, or if persons must demonstrate a property interest near a discharge or injury to pecuniary interest. Judicial review of approval or denial of permits. Could not find.

15. ARS 49-262F. Affirmative defense to civil liability. State law provides an affirmative defense for violations of water quality standards or permit conditions, if from a facility that is undertaking cleanup action under CERCLA or state analog. Federal regulation exempts discharges in compliance with instructions from an OSC.

16. 123.22(c): PD needs to contain a description of state administrative and judicial review procedures.

17. R18-9-A902.G.8 – permit exemption for discharges from charity carwashes, residential swimming pools and evaporative cooler bleed-off water.

18. Section II of the MOA states that ADEQ is not seeking authorization to administer the NPDES in Indian Country, as that term is defined in 18 U.S.C. 1511. However, the regulations at A902.A.1 require ADEQ, upon EPA's approval of the State NPDES program, to give notice to all Arizona NPDES permittees, "except NPDES permittees located on and discharging to tribal lands, . . . " "Tribal lands" is not a defined term. Need to clarify use of different terms in regulations and MOA.

19. The State statute defines "navigable waters" as "waters of the U.S. as defined by §502(7) of the clean water act." The Federal statute defines "navigable waters" as "waters of the United States, including the territorial seas." "Waters of the U.S." is not defined in the Clean Water Act but in the federal regulations. Therefore, the

AG's statement should clarify that State's definition of "navigable waters" encompasses what is found in EPA's regulation and not just the Clean Water Act (which does not have a definition).

20. The package's references to "toxic pollutants" are not consistent with EPA's. Section 49-201.37 defines toxic pollutant as a substance that would cause significant adverse reactions if ingested in drinking water. Other references in the package to toxic pollutants describe them as listed under the section 307 of the Clean Water Act as "injurious to public health". EPA's definition of toxic pollutants are broader and are defined as those pollutants listed under section 307 of the Clean Water Act regardless of whether they are injurious to public health. The State's narrower definition could be problematic in establishing discharge limitations for toxic pollutants based on best professional judgement" (see 122.44), as well as for the biosolids program.

21. Arizona's Attorney General's Statement interprets the Directors authority at § 49-203(B) for entry, inspection and sampling, and applying monitoring, recording and reporting requirements, as applying to those who actually discharge. However, section § 49-203(B) also extends this authority to facilities where discharges *may occur*. Therefore, AG's Statement should be amended to be consistent with state statute and § 308 of the CWA (which extends to "point sources" which are defined to include discrete conveyances where discharges "may occur.")

22. State's criminal penalty statutes set caps on penalties for individuals and enterprises. These caps are set for felonies and for three classes of misdemeanors (see 13-801, 802, 803). Section 49-263.01.H provides "each day of

violation of any provision of the section constitutes a separate offense." How do "felony," "misdemeanor," "violation," and "offense" fit together? i.e. How do multi-day "violations" fit with penalty caps which are set per "felony" and per "misdemeanor?"

23. Prohibitions (R18-9-A903.3). Applicable water quality requirements may include those imposed by EPA (e.g., EPA-promulgated water quality standards).

24. It is not clear from the program description that the resource analysis performed by ADEQ includes the resources necessary to oversee compliance with storm water and CAFO regulations and take any necessary enforcement. In addition, the resources identified for the pretreatment program may be insufficient. Section IV states that the NPDES program regulates "approximately 150 facilities" under permit. Apparently not considered are the approximately 1,500 facilities in Arizona under storm water general permits and the approximately 100 CAFOs in Arizona. The current resource allocation appears inadequate to address this workload when compared to similar states. At a minimum, the program description should explain the resources that will be devoted to this area and the assumptions that were used.

25. The program description assumes that federal funding will provide 40% of the funds needed to meet program expenses in FY '03-FY '05. This would require federal funding to increase about 5% each year. We are concerned about a potential funding gap in the event of a shortfall in federal funding.

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

May 16 2002

Vera S. Kornylak
The Arizona Center for Law
in the Public Interest
18 E. Ochoa St.
Tucson, AZ 85701-1915

In reply, refer to WTR-5

Dear Ms. Kornylak:

I am writing in response to your letter dated April 25, 2002, in which you request USEPA's timeline with respect to the consultation process under the federal Endangered Species Act (ESA) for the State of Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) Program under the federal Clean Water Act (CWA). Section 7 of the ESA requires federal agencies to ensure, in consultation with the U.S. Fish and Wildlife Service (FWS or Service) and/or National Marine Fisheries Service (NMFS), as appropriate, that any action authorized, funded, or carried out by the federal agency is not likely to jeopardize the continued existence of any federally-listed threatened or endangered species (listed species) or result in the destruction or adverse modification of designated critical habitat for such species.

Before responding to your question regarding the timeline, we are providing you some background on this matter. On January 14, 2002, the State of Arizona, in accordance with Section 402(b) of the CWA, requested approval from the USEPA for the Arizona Department of Environmental Quality (ADEQ) to administer the NPDES

Program. On February 15, 2002, USEPA determined that the State's submittal was incomplete.[1] USEPA and ADEQ are continuing to work on the issues of concern. Based on USEPA's discussions with the State, USEPA expects that the State will be able to submit a complete application shortly.

Given the likelihood that the State would submit a complete NPDES program application in the near future, USEPA initiated informal ESA section 7 consultation with the FWS on the possible approval of ADEQ's application pursuant to the Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act dated February 22, 2001 (National MOA). (A copy of the National MOA is included for your reference.) Specifically, on January 23, 2002, USEPA initiated informal consultation with the Service in a letter requesting a species list. On May 7, 2002, the USEPA sent an electronic mail memorandum to the Service attaching a draft version of a Biological Evaluation that analyzes the potential effects on listed species and critical habitat associated with EPA's approval of the State NPDES program application. Based on a conversation I had with the Service, we hope to receive the Service's response to our draft Biological Evaluation by May 21, 2002. After reviewing the Service's comments, the USEPA

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[1] The USEPA has 30 days from receipt of a State NPDES program submission to notify the State whether its submission is complete. 40 C.F.R. § 123.21. If USEPA determines that the State has a complete program submittal, the USEPA has 90 days from the submittal date to approve or disapprove the program. See Section 402(c) of the CWA; 40 C.F.R. § 123.61(b).

will continue with informal section 7 consultation and request the FWS's written concurrence with USEPA's finding that its approval is not likely to adversely effect listed species or critical habitat, or will initiate formal consultation with the Service in accordance with Section V.B.6 of the National MOA.

In response to your question regarding the timeline for ESA consultation, if the USEPA continues with informal consultation and requests the Service's concurrence on USEPA's "not likely to adversely affect" determination, then the Service should respond to USEPA's request for concurrence, in writing, within 30 days. If the Service does not concur, the Service's response should include the species and/or habitat of concern, the perceived adverse effects, supporting information, and rationale. If the USEPA initiates formal consultation, applicable law requires that the Service issue a biological opinion within 135 days following initiation of formal consultation. In the National MOA, the Service agreed to strive to issue a biological opinion within 90 days of an initiation of formal consultation.

I hope that this addresses your concerns. If you have any additional questions or concerns, please contact Jenny Mann at (415) 972-3512 or mann.jenny@epa.gov.

Sincerely,

/s/ Terry V. Oda
Terry Oda Manager
CWA Standards &
Permits Office

Enclosure

[Image Omitted In Printing]
Debra Bills

07/09/2002 01:41 PM

To: Mima Falk/R2/FWS/DOI@FWS, Kim Hartwig/R2/FWS/DOI@FWS, Carrie Marr/R2/FWS/DOI@FWS
cc: Sherry Barrett/R2/FWS/DOI@FWS, Cindy Schulz/RO/R2/FWS/DOI@FWS
Subject: AZ NPDES

Please take a look at this draft initiation letter.

Since EPA has not bothered to separate the no effects from the may affects, I don't want to take the time to do that now either. Although less than ideal, we can decide later which species we will concur with. Granted the information on effects is sparse; we could argue that we don't have enough information to initiate, but I'm not sure what that would gain us.

What do you think about notifying tribes? Will they be interested? This consultation specifically excludes Indian lands, but it is a big change for the state.

Other comments welcome.

[File Image Omitted In Printing]
azpdesinitiate.wpd

Debra

AESO/SE
2-21-02-F-xxx

July 9, 2002

Mr. Terry Oda
Manager, CWA Standards & Permits
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Oda:

This letter acknowledges the Fish and Wildlife Service's June 24, 2002, receipt of your June 21, 2002, letter requesting initiation of formal section 7 consultation under the Endangered Species Act, as amended. The consultation concerns the possible effects of the approval of Arizona's Pollution Discharge Elimination System program (AZPDES) for all of Arizona, except on Indian lands. Your letter concluded that the proposed action may affect but "is not likely to adversely affect" 60 listed species and critical habitat. Since you have requested formal consultation, we will proceed with formal consultation for those species or critical habitat where we do not concur with your "is not likely to adversely affect determination." A full explanation of our concurrence will be provided as an appendix to the biological opinion.

All other information required of you to initiate consultation was either included with your memorandum or is otherwise accessible for our consideration and reference. Section 7 allows the Service up to 90 days to conclude formal consultation with your agency and an additional 45 days to prepare our biological opinion. Therefore, we expect to provide you with our biological opinion no later than November 3, 2002. We acknowledge your request for an expedited consultation. Although we

will attempt to meet this request, given the complexity of this project we can not guarantee an expedited consultation. We will, however, provide a copy of the draft biological opinion, as requested.

In keeping with our trust responsibilities to Native American Tribes, by this letter we will notify the Tribes which may be affected by this proposed action and encourage EPA to invite the Bureau of Indian Affairs to participate in the consultation process.

Also, as a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If we can be of further assistance, please contact Carrie Marr (x 214) or Debra Bills (x 239).

Sincerely,

David L. Harlow
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ (Attn: M. Stegman)
John Kennedy, Arizona Game and Fish Department, Phoenix, AZ
Director, Navajo Fish and Wildlife Department, Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ

Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Tribe,
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ
Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

OFFICE OF THE REGIONAL ADMINISTRATOR

Jul. 11, 2002

Ms. Jacqueline E. Schafer
Director, Arizona Department of Environmental Quality
1110 W. Washington
Phoenix, AZ 85007

RE: Completeness Determination for State of Arizona Submission for NPDES Program Approval

Dear Ms. Shafer:

I was pleased to receive the proposed Arizona Pollutant Discharge Elimination System (AZPDES) Program submitted by your staff on June 11, 2002, and the subsequent supplements on July 8 and July 10. I am aware of how hard both your staff and mine have worked on these documents. I look forward to working with you throughout the remaining approval process.

After review of the proposed AZPDES program, we have determined that the program submission is administratively complete for the purpose of 40 CFR 123.21. As required by 40 CFR 123.61, EPA will soon publish in the Federal Register a notice of the public hearing and comment period along with a summary of the State's proposed program. EPA will also send to area newspapers a public notice of the program, hearing, and comment period.

Again, let me congratulate you and everyone at the State on their fine effort. If my staff can assist you in any way, please feel free to call.

Sincerely,

/s/ [Illegible]
for Wayne Nastri 11 July 2002
Regional Administrator

Sherry Barrett

07/17/2002 10:33 AM

To: Scott Richardson/R2/FWS/DOI @FWS, Kim Hartwig/R2/FWS/ DOI@FWS, Mima Falk/R2/ FWS/DOI@FWS

cc:

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

fyi

— Forwarded by Sherry Barrett/R2/FWS/DOI on 7/17/2002 10:25 AM —

Susan MacMullin

07/16/2002 12:13 PM

[Image Omitted In Printing]

To: Sherry Barrett/R2/FWS/DOI@ FWS

cc: Dale Hall/RO/R2/FWS/DOI@ FWS, Geoff Haskett/RO/R2/ FWS/DOI@FWS, Steve Spangle /R2/FWS/DOI@FWS

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

Sherry, it is very possible that EPA has talked to them. I gave FWS WO a heads up because if Quarles knows, probably the Secretary's Corridor knows. We are going to meet next week (RO and FO) to discuss the consultation.

Sherry Barrett

Sherry Barrett

07/15/02 05:07 PM

To: Cindy Schulz/RO/R2/FWS/DOI @FWS, Susan MacMullin/RO/ R2/FWS/DOI@FWS

cc: Debra Bills/R2/FWS/DOI@ FWS, Mima Falk/R2/FWS/DOI @FWS, Steve Spangle/R2/FWS/

DOI@FWS, Kim Hartwig/R2/FWS/DOI@FWS

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

Susan: I have no idea of how Steve Quarles would know about our internal discussions regarding the level of effect for this consultation. It is possible that EPA has informed the development community. I share your sigh.

Sherry
Cindy Schulz

Cindy Schulz

07/15/2002 03:10 PM

[Image Omitted In Printing]

To: Mima Falk/R2/FWS/DOI@FWS, Sherry Barrett/R2/FWS/DOI@ FWS, Debra Bills/R2/FWS/ DOI@FWS

cc:

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

— Forwarded by Cindy Schulz/RO/R2/FWS/DOI on 07/15/2002 04:11 PM —

Susan MacMullin

07/15/2002 11:12 AM

[Image Omitted In Printing]

To: Geoff Haskett/RO/R2/FWS/DOI@FWS, Dale Hall/RO/R2/FWS/DOI@FWS

cc: Steve Chambers/RO/R2/FWS/DOI@FWS, Brian Hanson/R2/FWS/DOI@FWS, Steve Helfert/RO/R2/FWS/DOI@FWS, Cindy Schulz/RO/R2/FWS/DOI@FWS

Subject: Consultation with EPA R9 on transferring the NPDES program to Arizona

Geoff and Dale,

The filed office gave me a heads up that this is looking like a jeopardy. RO and FO are going to meet around the 22nd to go through what we have. Then we're going to talk to Terry Oda (Water Permits Chief in R9.) If we can turn this around, we will. We will set up a briefing with you shortly.

Greg Beatty To: Debra Bills/R2/FWS/DOI@FWS

07/24/2002 05:00 PM cc: Carrie Marr/R2/FWS/DOI@FWS

[Image Omitted In Printing] Subject: Re: npdes transfer

I think it could effect with respect to losing federal connections in housing developments Harvard (the Homestead in Camp Verde), Verde Valley Ranch (jeopardy), or possibly other ground water developments that could reduce aquifer amounts and/or stream flow as a result of housing developments or possibly other Clean Water Act actions. This could be incredibly significant. Consider that on the Verde River, most WIFLs are detected in Verde Valley on private land, on San Pedro River most WIFLs are on private land, on Gila River (upstream of San Carlos) in the Safford Area WIFLs are on private land. These are all growing areas. Think about, that not considering Roosevelt Lake, there are probably less than 10 pairs of WIFLs known on Forest Service lands in AZ, probably les than 50 pairs of BLM Land, and probably less than 40 pairs on FWS land. Much of the flycatcher is on private land, thus this could have a devastating effect.

Debra Bills

Debra Bills To: Greg Beatty/R2/FWS/DOI@FWS

07/24/2002 03:43 PM cc: Carrie Marr/R2/FWS/DOI@FWS

[Image Omitted In Printing] Subject: npdes transfer

Greg

Carrie and I need to talk to you about how the NPDES transfer from EPA to the state will effect flycatcher.

How will this loss of section 7 consultation effect the swwf?

Debra

[Informal undated memo concerning Southwestern willow flycatcher]

Seventeen occupied bald eagle breeding areas (18 total) of Arizona's 43 occupied sites in 2002 were on the Verde River. While other breeding areas exist in the state, many are not regularly productive due to a variety of anthropogenic factors. As a result, the Verde River is important to the survival of the eagle in Arizona due to its central location in the state and the amount of productive eagles. The 12 sites on the Verde River that produced young in 2002, produced 20 of the 36 fledglings in Arizona. Therefore, in 2002, the Verde River possessed 40 percent (17/43) of the state's occupied breeding areas and 56 percent (20/36) of the state's productivity.

Five eagle breeding areas (Tower, Perkinsville, Oak Creek, Camp Verde, and Ladders) exist in closest proximity (headwaters to Verde Valley) to the area of development pressure and water pumping.

– – – –

The Verde River is contained within the Verde River Management Unit as a part of the recovery strategy in the draft Southwestern Willow Flycatcher Recovery Plan. To achieve recovery of the sub-species, there is a recovery goal of 50 pairs and other additional habitat measures to be met within this management unit. Four flycatcher sites have been discovered (Tuzigoot, Camp Verde, Ister Flat and Horseshoe Reservoir) along the Verde River, with the only occupied sites presently occurring at Camp Verde and in the conservation space of Horseshoe Reservoir. These two sites together possess less than 10 pairs of flycatchers. Critical habitat was designated for the flycatcher on the Verde River from SOB Canyon downstream to Horseshoe

Reservoir (now removed). This area encompasses the Verde Valley downstream to Horseshoe Reservoir.

The San Pedro River at its confluence with the Gila River (Winkelman site) is one the densest areas of nesting flycatchers (118 territories) in the state of Arizona and the entire range of this subspecies. Three breeding locations (San Pedro/Gila River confluence, Roosevelt Lake, Cliff/Gila Valley) throughout the subspecies range have contained nearly 50 percent of all known pairs (900). As of the end of the 2001 breeding season, the Winkelman site represented 34 percent of all flycatcher territories in Arizona. The importance of this site is emphasized because it is one of the few free-flowing rivers in Arizona, will be the largest site in Arizona when habitat at Roosevelt is inundated, supports flycatcher habitat along the Gila River, and is threatened by continued development and groundwater pumping from upstream users. Critical habitat was designated for the flycatcher on the upper and lower thirds of the San Pedro River (now removed).

In Arizona in 2001, 346 flycatcher territories were recorded throughout Arizona. The Roosevelt Lake (141 territories) and Winkelman (118 territories) totaled 75 percent of the states total (259/346). Following inundation and loss of habitat at Roosevelt, the Winkelman site will possess about 58 percent of all known birds in Arizona if the numbers stay similar. Flows on the San Pedro River not only support habitat along its banks, but also along the Gila River at their confluence. Management of Coolidge Dam upstream of the Gila./San Pedro confluence is not conducive to the development and maintenance of habitat without the sediment, natural hydrograph, and flows provided by the San Pedro River.

Two known consultations have occurred through EPA on housing developments on the Verde River. The Verde Valley Ranch, by Phelps Dodge resulted in a jeopardy opinion for flycatchers and was located at that time, next to the only two pairs of flycatchers known on the Verde River. The Homestead at Camp Verde, by Harvard Investments was also consulted upon for flycatchers by EPA. Extensive conservation measures developed by the applicant with the Service was able to avoid incidental take of flycatchers.

BRIEFING STATEMENT

PREPARED FOR: Region 2 Director

SUBMITTED: July 31, 2002 **STATE:** Arizona

TITLE: Arizona Pollutant Discharge Elimination System Program (AZPDES) Transfer from U.S. Environmental Protection Agency (EPA) Region 9

BACKGROUND/STATUS: The State of Arizona submitted an AZPDES application to EPA Region 9 in San Francisco on (*date?*). This program transfer would shift Clean Water Act responsibilities from the federal government to Arizona's Department of Environmental Quality. (ADEQ). The program transfer would include all point source discharges and construction stormwater permits in Arizona, excluding all Tribal lands. EPA received the application on June 11, 2002 and had 30 days to notify the State if the application package was complete. EPA sent AESFO a request for formal consultation June 21, 2002. They asked for completion of consultation by September 9, 2002, which is the EPA's 90 day deadline to approve or disapprove program transfer.

The proposed action is the delegation of the NPDES program to the State of Arizona. Additionally, the EPA will fund 40% of the AZPDES program for the next 3 years. We have informed them that we believe that they need to consult on both the delegation of the program and funding of the State's implementation of the program. EPA disagrees on the latter; apparently, EPA has never consulted on funding the program in other states.

The AZPDES Program will cover the following:

1. Issuance of individual permits for discharges from industrial, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and domestic wastewater treatment facilities that include publicly owned treatment works and privately owned treatment works;

2. Issuance of general permits;

3. Administration of the NPDES pretreatment program;

4. Administration of all stormwater discharge programs, including municipal storm sewer systems (combined and separate), general permits for stormwater discharges, and individual permits for stormwater-only discharges; and

5. Administration of the NPDES permitting programs for Federal facilities.

The EPA's BE states that the program transfer is solely an administrative transfer of authority and, therefore, this action may affect, but is not likely to adversely affect all 60 listed species and their critical habitats in Arizona. As background for their effect determination, EPA cited in their BE the National MOA (among EPA, the Service, and the National Marine Fisheries Service), which established enhanced coordination between our agencies on the CWA. The MOA establishes a process for elevation of AZPDES permits for which AESFO may have concerns. However, EPA will only federalize a permit if the concerns pertain to water quality. They will not federalize permits where the action causing the stormwater discharge adversely affects an upland species. We also have concerns about decreases in water quantity resulting from such actions and whether

or not EPA will federalize a permit based on our objections because it is not strictly 'water quality'.

We anticipate that the proposed action in EPA's BE will appreciably reduce the conservation status of the endangered Pima pineapple cactus, the Huachuca water umbel, and cactus ferruginous pygmy-owl. Great strides in minimizing the disturbance of construction projects in the range of these species to provide for their survival and recovery will be diminished, if not lost. The EPA will not analyze indirect effects and cumulative effects for this action because it is only an 'administrative shift in authority'. Since the definition of indirect effects is that it is caused by the proposed action, later in time, and reasonably certain to occur, then this action is more than a shift in program authority: we will lose our section 7 nexus for consultation, and construction projects in Maricopa, Pima, Pinal, Yavapai, and Santa Cruz counties will destroy important habitat and adversely affect listed species. For example, construction projects in Pima County are often large housing developments, with > 1,000 homes, for which authorization under the construction general permit is required from EPA before the grading can begin. We also know of several large housing developments planned for Pinal, Pima, and Yavapai counties. Without our section 7 tools, development will go forward unchecked in the aforementioned counties. We also plan to consult formally on the southwestern willow flycatcher, the razorback sucker, the bald eagle, and the Gila topminnow. Specific information for the above-listed species follows.

Pima Pineapple Cactus (PPC) (*Coryphantha scheeri var. robustispina*)

- The species was listed in 1993. PPC is restricted to Pima and Santa Cruz counties in southeastern Arizona. PPC occurs at relatively low densities (0.04 to 0.5 cactus per acre) across the Altar and Santa Cruz valleys, up to elevations of 4,000 feet.

- To date, we know of approximately 3,680 cacti. Since the listing, approximately 1,750 cacti (48% of the total known) have been transplanted or removed from projects that underwent section 7 consultation. The amount of PPC habitat lost during that time is approximately 7,670 acres.

- PPC has a relatively low rate of transplant success, and the majority of cacti that have been moved are more than likely dead. If they are still alive, they can be considered ecologically dead because they have been removed from their habitat and no longer maintain their ecological connections to the landscape.

- A total of 2,423 acres of Pima pineapple cactus has been conserved in some manner. Of that amount, 1,146 acres (47%) were conserved through conservation measures gained through section 7 consultation with EPA, specifically on indirect effects from authorizing general construction storm water permits. All of this conservation has taken place since 2000.

- Approximately 45% of PPC occur on State lands; 5% on Federal lands; 30% on private lands; and 20% on Tribal and other ownerships.

- A HCP is being planned for the Altar Valley to address the effects of livestock grazing and fire management. PPC will be one of the species of

concern. The Arizona State Land Department is participating in the development of this HCP.

- Progress continues on the Sonoran Desert Conservation Plan, a regional planning effort that will result in a multi-species HCP. The cactus is currently one of the species being evaluated, but proposed conservation measures for any of the species have not yet been developed.

- There is one PPC conservation bank in place (640 acres) on land owned by Pima County. We are currently working with a private landowner in the Altar Valley for the establishment of a 1,300-acre PPC conservation bank.

- In order for these conservation banks to function as conservation tools, there must be an economic incentive for landowners to participate. If section 7 consultations diminish, then there will be no "business" to send to the conservation banks.

- No projects have been stopped due to section 7 consultation.

- There have been a total of 17 formal consultations since listing; five of them have been with EPA, all occurred after 2000.

- Through review of proposed developments in Pima County for the years 2001-2002, there are 12 projects that would require section 7 consultation with EPA on their issuance of a storm water construction general permit. These are all projects that are close to known locations of Pima pineapple cactus and support suitable habitat. These projects total approximately 3,527 acres.

- With no conservation measures in place with EPA and the State of Arizona, all of this habitat and the Pima pineapple cactus on these sites would be lost.

- The majority of occupied and suitable habitat for this species occurs on State trust lands. The majority of these lands are zoned for development. PPC habitat will continue to be developed and fragmented, and the species will be at risk of severe decline.

Huachuca Water Umbel (HWU) (*Lilaeopsis schaffneriana var. recurva*)

- HWU was listed in 1997. Critical habitat was designated in 1999.
- The largest unit of critical habitat is a 33.7-mile reach of the San Pedro River, located in Cochise County, Arizona. This portion of the river supports 43 sub-populations of HWU.
- HWU is dependent on perennial water. The plant requires low flow, low velocity, pools and backwaters that undergo periodic flooding to reduce competition and shading from larger perennial plants. HWU needs saturated soil and is dependent on steady water levels for habitat stability.
- The city of Sierra Vista is experiencing tremendous growth. Housing and commercial developments use water that is pumped from the San Pedro River.
- Section 7 consultations with EPA have allowed for the development of conservation measures that minimize the impact of water withdrawals from the San Pedro. Without a federal nexus, the cumulative effects associated with continued development could compromise the water quantity in critical habitat, reducing the likelihood of the long-term survival and recovery of HWU.

Cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*)

- The pygmy-owl was listed in 1997. Its historical range included much of southern Arizona; current known locations are in Pima and Pinal counties.
- The pygmy-owl is found in a variety of vegetation communities below 4,000 feet elevation.
- To date, AGFD has documented 18 pygmy-owls in Arizona. Additional pygmy-owls likely occur on the Tohono O'odham Nation. Surveys are on-going to determine pygmy-owl populations in Mexico. There are currently only 2 pygmy-owls known to occur on Federal lands (Organ Pipe Cactus National Monument).
- Conservation of the species cannot rely on speculative populations that occur on the Tohono O'odham Nation. Conversations with Tribal biologists verify that this population is experiencing the same environmental stresses created by the on-going drought, as are other known populations in the state.
- Prior to listing of the pygmy-owl and section 7 consultations, most construction in pygmy-owl habitat was high-density with no conservation. Pygmy-owls do not utilize areas of high-density development; in addition to the loss of habitat, the resulting habitat fragmentation affects dispersal, courtship and pair bonding. Currently, areas without a federal nexus continue to be constructed through mass grading. We know of at least 7 projects with a federal nexus that occurred in suitable habitat without consultation; these projects affected approximately 600 acres of habitat.
- Through the section 7 consultation process, we work with developers to reduce development impacts to 20-25%

disturbance in breeding areas, and maintain dispersal and movement corridors to reduce the likelihood of genetically isolated populations. We have conducted 12 formal section 7 consultations on development projects; in addition, there have several consultation on other actions such as grazing, road improvements, etc.

- We are in informal consultation for 16 residential and commercial development projects throughout Maricopa, Pinal and Pima counties solely because of the EPA federal nexus; these projects consist of approximately 30,000 acres.

- Conserving the northwest Tucson meta-population is essential to the survival of the species; this population consistently has the highest productivity of young produced each year and contains 7 of the 18 known pygmy-owls in the state, or approximately 40% of the population.

- It is highly likely that we will lose our ability to ensure ANY level of pygmy-owl protection without the EPA federal nexus as demonstrated with the remand of critical habitat (at which point the COE withdrew projects from consultation).

- Without section 7 consultation, the only other option is to pursue incidental take violations through section 9; to date, law enforcement is unwilling to pursue such cases even when housing developments, schools and commercial projects are constructed within breeding territories.

- Pursuing future HCP's with private developers is strictly a voluntary process; without the probability of 'take' liability, landowners see no benefit in pursuing the HCP's. We have completed one HCP in northwest Tucson and are working with another private developer to complete their HCP; and we are working

with Pima County; the Town of Marana, and the Altar Valley Alliance to develop regional HCP's; the latter two are pursuing section 6 grants for funding their planning processes. All are in the planning phases.

- We have approached four developers with projects occurring within or adjacent to pygmy-owl territories; they declined our recommendation to develop HCPs, and several of those areas are now mass graded.
- Other conservation tools we are using to conserve the pygmy-owl include: section 6 Recovery Acquisition Grants and conservation banks.
- Safe Harbors are not an option for lands undergoing residential development, as construction activities take the species below baseline conditions. Safe Harbors work better in rural areas where landowners desire to enhance the condition of their properties for species.
- The Recovery Team is evaluating augmentation of pygmy-owl subpopulations through a captive breeding program or through translocation of birds. Maintaining suitable habitat, especially in the northern range of the species, is required for augmentation. Maintaining suitable habitat is occurring through section 7 consultations with EPA.
- Other species that may be adversely affected by water quantity issues associated with stormwater discharge permits are the southwestern willow flycatcher, Gila topminnow, and razorback sucker in the Verde River and Santa Cruz River watersheds.

Recommended Alternatives

1. EPA retains administration of individual permits under the stormwater discharge program. If projects adversely affect a listed species or critical habitat, the

applicant would not be authorized under the construction general permit, but would be required to obtain an individual permit. EPA would retain jurisdiction over the individual permit and would continue to consult with us on the adverse effects. This portion of the program could be delegated to the State in the future if they developed an adequate conservation and review program. This avenue would not require special conditions on the permit.

2. Since EPA has committed to funding ADEQ for the next three years, a Federal nexus will be retained for this time period, which would allow us time to work on alternatives 3 and 4.

3. We develop a MOU with the State (ADEQ and Arizona State Lands Department) to maintain the current level of review and conservation. Within this framework, the State would establish their own conservation programs to conserve priority areas for listed species.

4. We develop a HCP with the State to establish endangered species review of proposed projects and conservation measures to minimize and mitigate adverse effects to listed species.

SERVICE/DEPARTMENT ACTION TAKEN: We have prepared a letter to EPA requesting more information before we initiate formal consultation. We need more information regarding the history of permits that EPA has approved in certain geographical areas of Arizona in the last 3 to 5 years. We need to establish in the administrative record that the EPA did not analyze: adverse effects thoroughly and because of this, we will have to spend time doing their work for them.

POSITION OF INTERESTED PARTIES: Mining companies and developers across the state, including those in Pima County, are interested in this program transfer before a new governor is chosen in November.

DEPARTMENT/BUREAU PERSPECTIVE: Loss of section 7 consultation for the PPC, pygmy-owl, and HWU will result in significant effects to their survival and recovery through destruction, degradation, and fragmentation of their habitats.

FOR INFORMATION CONTACT: AESFO – Phoenix, 602-242-0210; Carrie Marr (x214), Debra Bills (x239), or Sherry Barrett (520-670-4617).

[SEAL] **United States Department of the Interior** [LOGO]
U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210
Fax: (602) 242-2513

In Reply Refer to:

AESO/SE 2-21-02-F-268

August 20, 2002

Mr. Terry Oda Manager
Clean Water Act Standards & Permits
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Oda:

This letter acknowledges the Fish and Wildlife Service's receipt of your June 21, 2002, letter requesting initiation of formal section 7 consultation under the Endangered Species Act, as amended. We received your request on June 24, 2002. The consultation is regarding the effects of the approval of Arizona's Pollution Discharge Elimination System (AZPDES) program for all of Arizona, except on Indian lands, on federally proposed and listed species and proposed and designated critical habitat. The U.S. Environmental Protection Agency (EPA) concluded that the proposed action may affect but is not likely to adversely affect all listed species and critical habitat in Arizona, but also requested initiation of formal consultation for the action described in the Biological Evaluation (BE) and our preparation of a biological opinion.

We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14). To complete the initiation package, please provide the following information:

1. A description of how the section 7 consultation process will continue to be implemented following delegation of the program to the State of Arizona.

2. A description of the specific area that may be affected by the action.

The June 21, 2002, BE gave no indication of the areas that may be affected by the action. Please define where listed species and their critical habitat may be affected by the action. Please include a list of all NPDES permits previously authorized in Arizona and the location covered in each permit.

3. A description of the manner in which the action may affect any listed species or critical habitat, and an analysis of any cumulative effects.

Provide a description of the manner in which the EPA will ensure that the analysis of indirect effects associated with the issuance of permits will continue. Please provide a description of how the analysis will be completed.

Upon receipt of these items, formal consultation will be initiated. The regulations governing section 7 consultation allow 90 days for formal consultation plus an additional 45 days to deliver the biological opinion. This 135 day time frame does not begin until we have received all information required to initiate formal consultation

as described in 50 CFR 402.14(c). Therefore, we ask that you request an extension from your September 9, 2002 deadline with the State of Arizona.

We look forward to working with you and State of Arizona on resolution of these issues. If we can be of further assistance, please contact Carrie Marr (x214) or Debra Bills (x239) at (602) 242-0210.

/s/ Brian Hanson

Brian Hanson
Acting Field Supervisor

cc: Regional Director, Fish and Wildlife Services
Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ
(Attn: M. Stegman)
Assistant Field Supervisor, Tucson Suboffice,
Tucson, AZ
John Kennedy, Arizona Game and Fish Department,
Phoenix, AZ
Director, Arizona Game and Fish Department,
Phoenix, Arizona
Regional Supervisor, Arizona Game and Fish
Department, Tucson, AZ
Director, Navajo Fish and Wildlife Department,
Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ
Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Nation, Camp Verde, AZ
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ

Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

W:\Carrie Marr\az npdes bo\azpdesletter.wpd.cgg

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

AUG 22 2002

Mr. Brian Hanson
Acting Field Supervisor
U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

In reply, refer to WTR-5

Dear Mr. Hanson,

On June 21, 2002, the U.S. Environmental Protection Agency (USEPA) sent the U.S. Fish and Wildlife Service (FWS) a biological evaluation (BE) and requested the initiation of section 7 formal consultation under the Endangered Species Act (ESA) on the USEPA's proposed approval of the State of Arizona's Pollutant Discharge Elimination System program (AZPDES program). I am writing in response to your letter dated August 20, 2002, in which you requested "information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14)."

In the August 20, 2002 letter, FWS requested:

> 1. A description of how the section 7 consultation process will continue to be implemented following delegation of the program to the State of Arizona.
>
> *USEPA Response:* It is unclear to the USEPA what FWS would like the USEPA to describe in response to this request. As you know and as discussed in the BE, the USEPA and the FWS have signed a Memorandum

of Agreement describing the manner in which the USEPA and the Services will work together to ensure that States administering the NPDES program protect federally listed endangered and threatened species. *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* dated February 22, 2001 (National MOA). Those procedures are designed to facilitate input by the Service into the State permit-issuing process and, if necessary, commit the USEPA to exercise its oversight authority over State NPDES permits to protect species. Those procedures contemplate close cooperation, but not section 7 consultation, on State-issued permits in light of the fact that a State NPDES permit is not a federal action, but an action of the State undertaken wholly under State law. As we indicated in our BE (see parts VI and VII of the BE), the USEPA is committed to following the procedures in our MOA to continue to ensure the protection of listed species after our approval of the State program. Section 7 would apply, however, if a project requiring a State-issued NPDES permit were to involve a Federal action, such as a Clean Water Act section 404 permit from the U.S. Army Corps of Engineers, that may affect listed species or critical habitat or if EPA were to object to a State NPDES permit and ultimately issue a federal NPDES permit for a discharge because the State failed to satisfy EPA's objection. And, of course, sections 9 and 10 of the ESA will continue to apply to the State and any entities that may receive NPDES permits in the State of Arizona.

2. The June 21, 2002, BE gave no indication of the areas that may be affected by the action. Please define where listed species and their critical habitat

may be affected by the action. Please include a list of all NPDES permits previously authorized in Arizona and the location covered in each permit.

USEPA Response: Part VII of the June 21, 2002 BE states, "As the location of future discharges cannot be anticipated, for purposes of this BE, the USEPA has determined that all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters may be affected by this action." As it is impossible to predict the location of future discharges, the USEPA believes that all areas containing listed species or critical habitat in, adjacent to, or dependent on surface waters maybe affected by the action. A list of such species was provided in Appendix C to the BE.

The appendix to this letter lists all NPDES permits authorized in the state of Arizona (excluding NPDES permits in Indian Country), and, for each such permit, the facility address and the name of the receiving water if available. The USEPA has previously provided FWS with documents containing this information.

3. Provide a description of the manner in which the EPA will ensure that the analysis of indirect effects associated with the issuance of permits will continue. Please provide a description of how the analysis will be completed.

USEPA Response: As described in detail in our BE (see Part V.B. of the BE), we will address any endangered species-related concerns regarding State-issued NPDES permits through the coordination process outlined in the National MOA.

The USEPA believes that the information requested in your letter, with the exception of a list of all NPDES

permits in Arizona, was provided in the June 21, 2002 BE. Therefore, we request that FWS consider the June 21, 2002 submission of the final BE as the initiation of formal consultation. Regardless, we are under a statutory deadline to approve or disapprove the Arizona program submission and would appreciate your cooperation in helping us to conclude this consultation in a timely manner so that we may meet our statutory deadline, as agreed by our respective agencies in section V.B.6 of the National MOA.

We look forward to continuing to work with you on this consultation, and we are prepared to assist you in expediting the process. If you have further questions, please contact Jenny Mann at (415) 972-3512 or mann.jenny@epa.gov.

Sincerely,

/s/ Terry Oda

Terry Oda, Manager
Clean Water Act Standards
and Permits Office

enclosure:

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ (Attn: M. Stegman)
Assistant Field Supervisor, Tuscon Suboffice, Tucson, AZ
John Kennedy, Arizona Game and Fish Department, Phoenix, AZ
Director, Arizona Game and Fish Department, Phoenix, Arizona
Regional Supervisor, Arizona Game and Fish Department, Tucson, AZ

Director, Navajo Fish and Wildlife Department, Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ
Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Nation, Camp Verde, AZ
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ
Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

ARIZONA ASSOCIATION INDUSTRIES [Image Omitted In Printing]

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September 6, 2002

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: ***Arizona Association of industries Comments in Support of ADEQ Administration of NPDES Program (67 Fed. Reg. 49,916 through 49,920 (August 1, 2002))***

Dear Mr. Mitchell:

The Arizona Association of Industries' Environment, Health and Safety Committee ("AAI") wishes to express its strong support for the United States Environmental Protection Agency ("EPA") timely approval of the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollutant Discharge Elimination System ("NPDES") program in Arizona (*see* 67 Fed. Reg. 49,916-20 (Aug. 1, 2002)). AAI believes that state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will result in increased understanding and responsiveness to local conditions, more timely resolution of permitting and other important issues, improved communication, greater efficiency, and enhanced environmental protection. Arizona clearly has satisfied the regulatory requirements for state program approval as set forth in 40 C.F.R. Part 123. Accordingly, EPA should approve the submitted program within the

90-day statutory review period. There is no reasonable legal or practical basis for any further delay.

AAI also has reviewed the comments to be submitted on ADEQ's NPDES application by the Greater Phoenix Chamber of Commerce and the Arizona Chamber of Commerce. AAI supports and endorses these comments and therefore incorporates the Chamber comments by reference. Thank you for the opportunity to provide comments on this important matter to the long-term benefit of the State of Arizona.

Sincerely,

Jeffrey Horner
Jeff Horner
Chairman, Environmental, Health & Safety Committee

cc: Mr. Chris Varga, Federal Permit Unit,
Arizona Department of Environmental Quality

DIAMOND VENTURES INC.

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E-MAIL: diamondventures@theriver.com

September 9, 2002

Mr. Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region IX
Water Division
75 Hawthorne Street
San Francisco, California 94105

Re: Support for ADEQ Administration of NPDES Program (67 Federal Register 49916-20, dated August 1, 2002)

Dear Mr. Mitchell:

Our firm is an Arizona based, regional real estate development company that is frequently involved with land development projects in various locations around the State of Arizona and other states in the southwestern United States. We, therefore, are very familiar with the requisite federal, state and local permitting procedures associated with the activities of our firm.

Diamond Ventures, Inc. respectfully requests that the United States Environmental Protection Agency ("EPA") approve the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollution Discharge Permit System ("NPDES") program, as referenced above. Support for this application comes from a wide range of "stakeholders" and a vast majority of the regulated community. The application is fully supported by the State of Arizona with approval (by

2/3rds margin) by both houses of the Arizona Legislature. The Arizona Governor's Office and Arizona Legislature placed the highest priority upon this application and resulting program by establishing a full funding commitment to ADEQ for the administration of this program, even though these are lean years for state government.

Our firm believes that the adoption of the program is good for the State of Arizona and strongly supports the transition of permitting responsibility from EPA Region IX to ADEQ. The following reasons support this conclusion:

1.) **Local Control and Understanding of Local Conditions:** A state agency is better prepared to understand and respond to local conditions in a manner that will result in improved environmental quality for future generations. The administration of NPDES program by the individual states has been embraced by the U.S. Congress, through the Clean Water Act, and implemented in 44 states.

2.) **Improved Communications:** Improved environmental protection is dependent upon the quality of communication between the regulatory agency and regulated community. ADEQ maintains offices in Phoenix, Tucson and Flagstaff and is therefore in an advantageous position to maintain the highest quality and direct communication with the regulated community.

3.) **ADEQ Qualifications:** ADEQ has demonstrated that it is fully capable of administering complex environmental programs. With committed resources, as

mentioned above, the agency has extensive permitting and enforcement experience under the current NPDES and Aquifer Protection Permit programs. Contrary to certain criticisms leveled at ADEQ relative to the proposed application, ADEQ is fully capable to administer the Arizona Pollution Discharge Permit ("AZDES") program.

4.) **Endangered Species and Historic Properties:** The U.S. Congress has expressed a strong preference to have states take the lead role in the protection of waters within their boundaries so long as sufficient program support is generated within states and so long as the statutory elements of the Clean Water Act are satisfied. The AZDES program has been designed consistent with the programs in place in 44 other states relative to the Endangered Species Act and Section 7 consultations with the U.S. Fish and Wildlife Service. Like other states that administer pollution discharge permits, procedures have been built into the AZDES program to provide the appropriate and legally mandated oversight of the program by EPA and U.S. Fish and Wildlife. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a permit under the AZDES program is not unusual and is, in fact, typical.

The protection of historic properties is not a significant concern of the approval of the AZDES program in that, like under the Endangered Species Act, ADEQ is not required to consult with the State Historic Preservation Office ("SHPO") (in accordance with Section 106 of the National Historic

> Preservation Act.) In the same manner as stated above, the AZDES program is designed consistent with the programs in place in the vast majority of states relative to the National Historic Preservation Act.

In closing, we urge you to approve the ADEQ application to administer the NPDES program. We are confident that such action will result in enhanced environmental protection within the State of Arizona and improved environmental quality for future generations of Arizona residents.

Sincerely,

/s/ K. Abrahams

Kenneth D. Abrahams Vice President

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September 13, 2002

Via Federal Express

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: Comments in Support for Administration of the NPDES Program by the Arizona Department of Environmental Quality 67 Fed. Reg. 49916-20 (Aug. 1, 2002)

Dear Mr. Mitchell:

On behalf of the Southern Arizona Home Builders Association ("Association"), we appreciate the opportunity to submit the following comments in support of the Arizona Department of Environmental Quality ("ADEQ") application to administer the National Pollutant Discharge Elimination System ("NPDES") program. *See* 67 Fed. Reg. 49916 (Aug. 1, 2002). The Association has over 700 members and represents builders, developers, contractors, and others engaged in the development and construction of single-family homes and apartments. The Association has a substantial interest in administration of the NPDES program because

our members are generally required to obtain storm water permit coverage for construction activities and to comply with storm water pollution prevention planning requirements. The following discussion provides the basis for the Association's support of the Arizona Pollutant Discharge Elimination System.

I. Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices in Phoenix, Flagstaff and Tucson, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco, notwithstanding the best efforts

of EPA to do so with more limited local resources. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

- *Increased understanding of local conditions.* A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(E).

- *More Efficiency.* We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based

and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[1] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

- *Enhanced environmental protection.* The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

[1] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program Well.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

- *The State of Arizona has shown a solid commitment to the AZPDES program.* The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

- *ADEQ is fully capable of administering this program well.* In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

III. The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ,

as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

- *AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits.* Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) &

R18-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act. See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

- *Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants.* Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges

permitted by ADEQ will not adversely affect listed species.

- *Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved.* The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

- *Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS.* This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address

adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G) & (H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of this proceeding. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

IV. Conclusion and Request for Approval of ADEQ's Application.

ADEQ administration of the NPDES program will result in significant benefits to our state, including protection of water quality. There is strong support from state government to administer this program. Concerns regarding the implications of EPA approval of the AZPDES program on endangered species and historic properties have been exaggerated. These issues can and should be resolved through USFWS and SHPO cooperation with ADEQ. We therefore respectfully request that EPA approve ADEQ's application to administer the NPDES program.

We appreciate your consideration of these comments. If you have any questions or concerns regarding these comments, please contact the Association at your convenience at (520) 795-5114.

Sincerely,

/s/ Robert Anderson
Robert D. Anderson

cc: Mr. Chris Varga, Federal Permit Unit, AZ Dept of Environmental Quality
Alan Lurie, Southern Arizona Home Builders Association

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

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September 13, 2002

Matthew Mitchell
Water Division, WTR-5 EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: Arizona's NPDES primacy application

Dear Mr. Mitchell:

The Arizona Center for Law in the Public Interest, Defenders of Wildlife, the Center for Biological Diversity, and the Sierra Club have the following comments on the State of Arizona's application to administer the national pollutant discharge elimination system ("NPDES") program in Arizona (referred to hereafter as "AZPDES program") as noticed and described in 67 Fed. Reg. 49916 (August 1, 2002). Unless and until the deficiencies described below are remedied, EPA lacks the authority to approve the AZPDES program.

I. EPA Must Comply Fully With The Endangered Species Act.

A. EPA Must Complete Formal Section 7 Consultation Prior To Any Decision Approving AZPDES Program.

Every federal agency must, "in consultation with and with the assistance of the [U.S. Fish and Wildlife Service],

insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . " Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). In furtherance of these obligations, each federal agency is required to complete formal section 7 consultation with the U.S. Fish and Wildlife Service ("FWS") whenever an agency undertakes an action that "may affect listed species or critical habitat," unless the FWS determines "that the proposed action is not likely to adversely affect any listed species or critical habitat" 50 C.F.R. § 402.14(a)-(b). "Effects" of an action include " . . . the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action . . . " 50 C.F.R. § 402.02. Furthermore, once the section 7 consultation has been initiated, the consulting federal agency is prohibited from making any "irreversible or irretrievable commitment of resources with respect to the agency action . . . " 16 U.S.C. § 1536(d).

There is no doubt that EPA's consideration and approval of the AZPDES program is an action mandating formal consultation under section 7 of the ESA. Indeed. EPA has acknowledged that approval of the AZPDES program may affect numerous federally-listed species and designated critical habitats in Arizona and therefore, EPA requested initiation of formal consultation with FWS. [See Letter from Terry Oda to David Harlow dated June 21, 2002 (hereafter referred to as "June 21st Letter."] However, formal section 7 consultation must be *completed* prior to any decision by EPA regarding the AZPDES program.

B. EPA Has Failed [sic] Initiate Formal Section 7 Consultation.

Notwithstanding EPA's acknowledgment that it has a duty to formally consult with FWS regarding the AZPDES program, EPA has not yet properly initiated formal section 7 consultation. On August 20, 2002, FWS properly rejected EPA's request to initiate formal consultation based on EPA's failure to provide FWS with the basic information necessary, and required by law, for preparation of a Biological Opinion ("BO"). [See Letter from Brian Hanson to Terry Oda dated August 20, 2002 (hereafter referred to as "August 20th Letter".] The ESA and its implementing regulations require that written requests to initiate formal consultation must include, among other information, a "description of the specific area that may be affected by the action," and a "description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects." 50 CFR 402.14(c)(2,4). As noted in the August 20th Letter, EPA failed to meet these minimum requirements. [See August 20th Letter stating, "We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14)."] Indeed, EPA's Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program, dated June 21, 2002, (hereafter referred to as "EPA's BE") is woefully deficient in several respects.

For example, EPA's BE fails to adequately assess the manner in which approval of the AZPDES program may affect listed species or critical habitat in Arizona. EPA asserts that "[i]n changing from a Federal permitting

program to a State permitting program, the permit-related ESA Section 7 process for consultation *will no longer apply.*" [EPA's BE at 15 (emphasis added).] The procedural and substantive requirements of section 7 of the ESA are among the most fundamental and important protections afforded to listed species and critical habitat under the ESA. There is no question that NPDES permitting decisions have in the past and will, in the future, result in substantial negative impacts to listed species and critical habitat. Terminating section 7 consultations on NPDES permitting actions in Arizona will have monumental impacts on listed species and critical habitat. Yet, EPA's BE fails to analyze these likely impacts whatsoever. Indeed, EPA's BE fails to analyze the impacts of this action for even one of the 60 federally-listed species that EPA identified as likely to be affected: Instead, EPA simply concludes that "any potential adverse effects to Federally-listed species or critical habitat" resulting from transfer of NPDES permitting authority to Arizona "would be insignificant and/or discountable." EPA's BE at 16. This conclusion is not only legally defective on its face – there is no "insignificant and/or discountable" exception for adverse effects under the ESA – but is completely unsupported by any meaningful analysis.

EPA's BE is also legally deficient because it fails to undertake any analysis of cumulative effects as required by the ESA. ESA implementing regulations define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. If the AZPDES program is approved by EPA, there is an absolute certainty that in the future, hundreds of state

NPDES permits will be issued annually with the potential of causing substantial negative impacts to listed species and critical habitat. Yet, EPA's BE contains no discussion, let alone analysis, of even basic information essential to accurately assess these cumulative effects including, for example, how many NPDES permits are likely to be issued by the State of Arizona on an annual basis, what specific species and critical habitats are likely to be impacted by such permits, and how the specific species or critical habitat may be affected.

C. EPA's Approval Of The AZPDES Program Will Jeopardize The Continued Existence Of Dozens Of Federally-Listed Species And Result In The Destruction Or Adverse Modification Of Critical Habitat.

EPA's approval of the AZPDES program is no small procedural matter for the approximately sixty endangered and threatened species in Arizona. As already noted, it is EPA's position that transferring the NPDES program to the State of Arizona will terminate application of the requirements of section 7 of the ESA with respect to NPDES permitting, thus eliminating one of the most important legal protections for these species and their habitats. Nonetheless, EPA asserts that such action will have at most "insignificant and/or discountable" impacts on listed species and critical habitat. One need look no further than the substantial impacts that have and continue to occur to listed species and critical habitat in Arizona from *EPA-issued* NPDES permits, where the requirements of section 7 of the ESA are in effect, to understand that EPA's claim is simply incorrect.

Stormwater discharge and point source discharge permits for residential and commercial urban development projects often result in significant adverse impacts to listed species and critical habitat. Obvious adverse effects of such NPDES permitting include the elimination of listed species, destruction of occupied and unoccupied habitat, and adverse modification of designated critical habitat. These effects are often significantly multiplied when considered alongside impacts resulting from Clean Water Act section 404 permits. Other NPDES permit impacts include increased domestic water consumption, degradation of watershed and water quality conditions, and resulting harm to riparian or aquatic listed species and designated critical habitat, often many miles away from the permitted development.

The cactus ferruginous-pygmy owl ("pygmy owl") is one of dozens of species in Arizona impacted by projects and activities authorized by EPA's NPDES program. The pygmy owl is threatened primarily by past and ongoing destruction and fragmentation of habitat, particularly within the Tucson Basin, from urban and commercial development, much of which is authorized by NPDES permits. The harmful effects of NPDES permitting is also apparent in the San Pedro River basin where increased pollution is threatening the species that depend on that water-based ecosystem for survival. The FWS has detailed a number of concerns with regard to NPDES permitting in and around the San Pedro River basin including the impacts of the effects of consumptive water use from urban development. [See Letter to Alexis Strauss from U.S. FWS dated April 27, 2000 (hereafter referred to as "April 27th Letter").] According to the FWS, annual groundwater withdrawals exceed replacement in the

Sierra Vista subwatershed by roughly 7,000 acre-feet, and are ultimately expected to diminish or eliminate baseflow in the river. Listed species such as the southwestern willow flycatcher, Huachuca water umbel, spikedace and loach minnow, and their critical habitats, will all be affected by any such baseflow reduction. Groundwater pumping for new urban development is clearly an indirect effect of NPDES permitting in this region.

FWS has also detailed a number of harmful indirect effects of urban development in the Verde River basin of central Arizona. For example, in its December 26, 2001 Biological Opinion on the NPDES permit for the "Homestead at Camp Verde," a development project the FWS found that:

> Urbanization near the Verde River has reduced the ability to establish dense riparian vegetation. Development has created and maintained the demand for domestic and industrial water use resulting in increased groundwater pumping and flood control structures that alter stream hydrology and also increases bridges, roads, vehicles, sand and gravel mining and other industrial and commercial uses detrimental to riparian habitat. Urbanization has also increased the demand for recreational use of remaining riparian areas for trails, campgrounds and use of river areas for off-road vehicles, etc. Developments and recreation increase trash, lawns, bird feeders, and habitat fragmentation, and as a result, an increase of predators or passerines such as cowbirds house cats, grackles, and ravens . . .

[Biological Opinion, Homestead at Camp Verde NPDES Permit, December 26, 2001.] Overuse of groundwater in

the Verde River basin is also a major concern. According to FWS, "the extent of groundwater overdraft (water resources that are not being replenished) in [Chino and Verde valleys] ... was considered critical ... " *Id.* [Furthermore, urbanization also results in watershed degradation, including increased runoff, erosion, altered hydrogeomorphology, incision, lowered water table, and resulting losses of riparian vegetation. These indirect effects of NPDES permitting adversely affect Verde River basin riparian and aquatic habitats, and dependent federally listed species, including the Bald eagle, Southwestern willow flycatcher, loach minnow, spikedace, razorback sucker and their designated critical habitats.

The examples above are merely a sampling of the negative impacts that are likely to result from EPA approval of the AZPDES program. At present, these impacts must, at least, be examined through the ESA's section 7 consultation process. Once the program is transferred to the State, it is apparently EPA's position that section 7 consultation will rarely, if ever, occur, thereby substantially increasing the likely impacts of AZPDES permits on listed species and critical habitat. Notwithstanding EPA's claims to the contrary, neither the provisions of the Clean Water Act, Arizona's water quality standards, or EPA's proposed oversight of the AZPDES program are adequate substitutes for section 7 consultation under the ESA. In short, without a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program.

II. The AZPDES Appeals Process Is Not Consistent With Federal Requirements.

EPA may only approve a state's NPDES permit program that is consistent with and not less-stringent than the federal NPDES permit program. 40 C.F.R. § 123.1. Although states are free to enact provisions that are more stringent than the federal requirements, the states must meet the minimum federal requirements. Federal law requires that states administering NPDES programs shall provide for public participation in the state enforcement process by providing either of the following:

> (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest **which is or may be adversely affected**; or
>
> (2) Assurance that the state agency or enforcement authority will:
>
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26 (b)(4);
>
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
>
> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action.

40 C.F.R. § 123.27 (d) (emphasis added). Furthermore, the judicial review available under a state's NPDES program must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain

judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30. There can be no serious dispute that the language in 49-323 (A) fails to comply with federal law.

A.R.S. § 49-323 (A) provides, in pertinent part, that an appeal may be taken "by any person who is adversely affected by the action or by any person who may with reasonable probability be adversely affected by the action and who has exercised any right to comment on the action . . . " This provision is far more restrictive than the federal standard and clearly violates the requirements of 40 C.F.R. §123.30. This "procedure" will have a chilling effect on public participation in all aspects of the permitting process but especially the judicial review because it severely limits the right to judicial review of a permitting decision. Again, the Arizona Center for Law in the Public Interest and the Sierra Club, among others, have been raising this issue for over a year. We raised it with the Arizona Legislature, the Governor, and the Arizona Department of Environmental Quality. At this point it is evident that unless the State of Arizona is ordered to make the necessary changes by either EPA or a court, the State will maintain the status quo of denying citizens their federally established right to judicial review of permit decisions.

III. The State Of Arizona Cannot Adequately Fund The AZPDES Program.

Pursuant to the Clean Water Act, the state seeking delegation must have adequate authority to administer

the NPDES program. 33 U.S.C. § 1342(6). In the present case, Arizona lacks the authority because the program has no funding mechanism whatsoever. It is our understanding that EPA is providing the majority of the funding for the AZPDES program. Without EPA funding, it is apparent that the State would be unable to support the AZPDES program thereby forcing EPA to withdraw delegation. In addition to the State's ongoing budget crisis, the State has assured that the AZPDES program would not be self-supporting by prohibiting itself from instituting any type of permit fee. A.R.S. § 49-255.01 (J) states that " . . . The Department shall not charge a fee to issue, deny, modify. suspend or revoke a permit under this Article or to process permit applications." Permit fees are a widely-used for obtaining additional funding for such programs on both state and federal levels. *See e.g.,* Cal. Water Code § 13260 (establishing annual fees). It is our understanding that the State made the decision to not implement permit fees in order to gain support for the primacy process from the regulated community. However, this compromise will likely cost Arizona the NPDES program because after EPA funds are terminated, Arizona will most likely be unable to fund the program as it is currently defined.

IV. International Wastewater Treatment Plants Must Remain Under EPA's Authority.

EPA should retain authority for regulating all NPDES permits for international wastewater treatment plants, and specifically, the Nogales International Wastewater Treatment Plant. EPA is an important part of the process towards repairing the Nogales Plant and it is imperative that EPA remain the regulator of that facility.

Thank you for the opportunity to submit comments on the AZPDES program. If you have any questions regarding this letter, please contact Vera Komylak at 520-529-1798 or Michael Senatore with Defenders of Wildlife at 202-682-9400 ext. 123.

Sincerely,

/s/ [Illegible]

Vera S. Komylak
Staff Attorney
Arizona Center for Law
in the Public Interest
on behalf of,

Michael P. Senatore,
Litigation Director
Defenders of Wildlife

David Hogan,
Urban Wildlands and
Rivers Program Coordinator
Center for Biological Diversity

Sandra Bahr,
Conservation Outreach
Director
Sierra Club

[LOGO] [LOGO]

2575 E. Camelback Road
Phoenix, Arizona 85016-9225

September 14, 2002

Via Federal Express

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: *Support for ADEQ Administration of NPDES Program (see 67 Fed. Reg. 49916-20 (Aug. 1, 2002))*

Dear Mr. Mitchell:

The Greater Phoenix Chamber of Commerce and the Arizona Chamber of Commerce respectfully request that the United States Environmental Protection Agency ("EPA") approve the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollutant Discharge Elimination System ("NPDES") program (*see* 67 Fed. Reg. 49916-20 (Aug. 1, 2002)). The two chambers have over 5,000 members throughout the State of Arizona. In addition, the following organizations with over 30,000 additional members individually express their support for EPA approval of ADEQ's NPDES application and the following comments:

- American Forest & Paper Association
- Arizona Association of Industries
- Arizona Cattlemen's Association
- Arizona Farm Bureau
- AMIGOS

- Arizona Mining Association
- Arizona Rock Products Association
- Associated General Contractors (Arizona Chapter)
- Homebuilders Association of Central Arizona
- National Federation of Independent Business (Arizona)
- Southern Arizona Home Builders Association.

I. Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices throughout the state, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco. The opportunities for

face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

- *Increased understanding of local conditions.* A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B).

- *More Efficiency.* We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements).

Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[1] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

- *Enhanced environmental protection.* The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

[1] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

- *The State of Arizona has shown a solid commitment to the AZPDES program.* The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

- *ADEQ is fully capable of administering this program.* In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

III. The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when

it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

- *AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits.* Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) & RI8-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated

with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act*. *See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

- *Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants.* Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

- *Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved.* The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

- *Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS.* This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO.

However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state-historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process.

EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

IV. Conclusion and Request for Approval of ADEQ's Application.

ADEQ administration of the NPDES program will result in significant benefits to our state, including protection of water quality. There is strong support from

state government to administer this program. Concerns regarding the implications of EPA approval of the AZPDES program on endangered species and historic properties have been exaggerated. These issues can and should be resolved through USFWS and SHPO cooperation with ADEQ. We therefore respectfully request that EPA approve ADEQ's application to administer the NPDES program.

We appreciate your consideration of these comments. If you have any questions or concerns regarding these comments, please contact me at your convenience at (602) 530-8221.

Sincerely,

/s/

David P. Kimball, III
Environment Committee
Chairman,
Greater Phoenix Chamber
of Commerce & Arizona
Chamber of Commerce

cc: Mr. Chris Varga, Federal Permit Unit,
Arizona Department of Environmental Quality
DPK/RAB/pgb

1045629v1

Home
Builders
Association
OF CENTRAL
ARIZONA

[Image Omitted
In Printing]

Via Federal Express

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: ***Comments in Support for Administration of the NPDES Program by the Arizona Department of Environmental Quality 67 Fed. Reg. 49916-20 (Aug. 1, 2002)***

Dear Mr. Mitchell:

The Home Builders Association of Central Arizona ("Association") appreciates the opportunity to submit the following comments in support of the Arizona Department of Environmental Quality ("ADEQ") application to administer the National Pollutant Discharge Elimination System ("NPDES") program. *See* 67 Fed. Reg. 49916 (Aug. 1, 2002). The Association has over 800 members and represents builders, developers, contractors, and others engaged in the development and construction of single-family homes and apartments. The Association has a substantial interest in administration of the NPDES program because our members are generally required to obtain storm water permit coverage for construction activities and to comply with storm water pollution prevention planning requirements. The following discussion provides the basis for the Association's support of the Arizona Pollutant Discharge Elimination System.

I. Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices in Phoenix, Flagstaff and Tucson, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco, notwithstanding the best efforts of EPA to do so with more limited local resources. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

- *Increased understanding of local conditions.* A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances

environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B).

- More Efficiency. We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget

efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[1] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

- *Enhanced environmental protection.* The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program Well.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

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[1] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

- *The State of Arizona has shown a solid commitment to the AZPDES program.* The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

- *ADEQ is fully capable of administering this program well.* In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

III. The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when

issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

- *AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits.* Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) & R18-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act. See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That

MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

- *Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants.* Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

- *Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved.* The extent of federal control and involvement in this state is pervasive. The federal government owns almost

70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

- *Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS.* This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any

event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of this proceeding. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten

full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

IV. Conclusion and Request for Approval of ADEQ's Application.

ADEQ administration of the NPDES program will result in significant benefits to our state, including protection of water quality. There is strong support from state government to administer this program. Concerns regarding the implications of EPA approval of the AZPDES program on endangered species and historic properties have been exaggerated. These issues can and should be resolved through USFWS and SHPO cooperation with ADEQ. We therefore respectfully request that EPA

approve ADEQ's application to administer the NPDES program.

We appreciate your consideration of these comments. If you have any questions or concerns regarding these comments, please contact the Association at your convenience at (602) 274-6545.

Sincerely,

/s/ Connie Wilhelm
Connie Wilhelm, President
Home Builders Association
of Central Arizona

cc: Mr. Chris Varga
Federal Permit Unit
Arizona Department of Environmental Quality

THE STATE OF ARIZONA
GAME AND FISH DEPARTMENT
2221 WEST GREENWAY ROAD,
PHOENIX, AZ 85023-4399
(602) 942-3000 •
WWW.AZGFD.COM

[LOGO]

Governor
Jane Dee Hull
Commissioners
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Susan E. Chilton, Arivaca
W. Hays Gilstrap, Phoenix
Joe Melton, Yuma
Director
Duane L. Shroufe
Deputy Director
Steve K. Ferrell

[SEAL]

September 16, 2002

Mr. Matthew Mitchell (WTR-5)
Water Division, EPA Region 9
75 Hawthorne Street
San Francisco, California 94105

RE: State Program Requirements; Application to Administer the National Pollutant Discharge Elimination System Program in Arizona (Fed. Reg. Vol. 67, Number 148, 49916-49920)

Dear Mr. Mitchell:

The Arizona Game and Fish Department (Department) has reviewed the above-referenced Federal Register notice, dated August 1, 2002, regarding state program requirements for the Arizona Department of Environmental Quality's (ADEQ) application to administer the National Pollutant Discharge Elimination System (NPDES) Program in Arizona. We understand that the State of Arizona has submitted a request for approval of the Arizona Pollutant Discharge Elimination System

(AZPDES) program. Under this request, ADEQ is seeking approval to administer a partial program for discharges of pollutants into waters under its jurisdiction. With the approval of this program, ADEQ's permitting actions would not be subject to Section 7 consultation under the Endangered Species Act. However, the Department understands that Endangered Species Act issues have been addressed in the Memorandum of Agreement (66 FR 11202) between the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service (FWS). This agreement will serve as a guideline for EPA, FWS, and the State of Arizona to ensure that NPDES permits will not negatively impact endangered and threatened species.

The Department has worked cooperatively with ADEQ and applicants during the preliminary review of NPDES permit applications to ensure that potential impacts to special status species and other fish and wildlife resources are considered and addressed (avoided or minimized) early-on during the permitting process. We look forward to continuing this level of cooperation between our agencies, and to seek opportunities for potential habitat restoration or enhancement projects that benefit fish and wildlife resources in Arizona. Again, the Department appreciates the opportunity to comment on Arizona's NPDES Program. Please contact me at (602) 789-3605 or bbroscheid@gf.state.az.us if you have any questions regarding this letter.

Sincerely,

/s/ Bob Broscheid
Bob Broscheid
Project Evaluation Program Supervisor

cc: Regional Habitat Program Managers
Chris Varga, Federal Permits Unit, ADEQ

DRAFT Sept. 16, 2002

Summary of meeting with U.S. EPA, State of Arizona DEQ, and U.S. Fish and Wildlife Service: September 13, 2002, Phoenix, AZ.

Attendees: Steve Chambers, Tom Gatz, Carrie Marr, Debra Bills, Mima Falk (USFWS); Terry Oda, Jenny Mann, Julie Walters (EPA); Karen Smith, Chris Varga, Michele Robertson (ADEQ)

The first item of discussion was if formal consultation had begun. Terry wanted to know if EPA was in formal consultation and what date consultation started. We indicated that we were not sure, but would be getting EPA an answer this week. We would also send EPA a letter this week with the information. If formal consultation started on June 24, 2002, the BO would be due in early November. We are on record sending EPA a letter requesting additional information in response to their request for formal consultation, dated August 20, 2002.

We talked about EPA/ADEQ's deadline for program transfer and EPA said that their 90 day deadline for transfer was October 8, 2002. ADEQ stated that there were political constraints because Gov. Hull has stated that she wants the program transfer to be one of her legacies. Therefore, the program must transfer before Gov. Hull leaves office in December. The State is the only one that can grant an extension and they said that the first of November would not be unreasonable. If the State does not grant an extension, the entire program will cease until either an extension is granted or the program is transferred.

We discussed what species would be included in the consultation. EPA attached a list of all the listed species in the state, but did not request specific species for formal consultation. We agreed that the Service would determine which species would be included in the consultation.

We then discussed our concerns with aquatic and aquatic-dependent species. We all agreed that the process defined in the MOA would address aquatic concerns, but we expressed our concerns about issues of water quantity on species such as Huachuca water umbel, razorback sucker, SW willow flycatcher, and Gila topminnow. EPA stated that effects from pumping groundwater to provide water to housing developments is out of their CWA jurisdiction and they have no discretion to modify or condition permits for this type of effect.

At this point, EPA voiced their opinion on indirect effects from their action. They believe there are no indirect effects associated with the delegation because it is simply an administrative action. **We disagree** with their interpretation and told them that we have to evaluate all the effects (direct, indirect, interrelated and interdependent) regardless of whether they could do anything about those effects.

Arizona DEQ explained how they were going to handle the permit process. They are proposing a "SMART NOI" application. It would be electronically based. Applicants would answer a series of questions and the NOI's would be sorted according to the answers. There would be 3 categories: 1) waiver exemptions; 2) general permits (the majority would fall into this category); and 3) problem permits. These are NOI's that would be red flagged with having potential problems. The applicant would be notified immediately that there might be a problem and an

additional 30 days will be needed to evaluate the request. This would include effects to unique waters, impaired waters, etc. The State is willing to include information from us to include in this data layer. This information could be in the form of T and E species' range information, etc. NOI's that fall within these areas would be sent over to us for review. We can then contact the applicant. The State will assist us in setting up a meeting to discuss ways to minimize the effects. They **will not** condition permits to address upland species concerns. That is outside of their authorization. They would be willing to send out letters on our letterhead notifying applicants that they may be in violation of Sect 9. if they proceed without Service input.

The discussion turned to upland species and indirect effects. The bottom line is this: EPA believes that the MOA only addresses aquatic species and it is out of their authority and discretion, under the CWA, to address concerns to upland species. They will not federalize those permits and claim that even if they did, they could not condition the permits to address upland species. We disagree on this point. We feel that the MOA covers all listed species. We also believe that EPA has the obligation under ESA to evaluate all the effects from their action on all listed species.

EPA also stated that they will have a very minor oversight role, only becoming involved after ~~the State evaluates the NOIs~~. the FWS has disagreed with a permit, contacted ADEQ about the problem, and failed to come to a resolution. They would not agree to any kind of specific oversight role, other than what is outlined in the MOA.

EPA asked if they could delegate the program and write a 7(d) determination for that action. We asked if they could

take the program back if our opinion was jeopardy. They said probably not and we indicated that perhaps delegating the program is an irreversible or irretrievable commitment of resources.

Unable to proceed further in the discussions, the decision was made to elevate the problem to the WO. EPA had already been working on a elevation paper and they are going to send it to Steve Chambers, Steve Spangle and Debra Bills early next week. We agreed to edit and add our perspective by the end of next week.

[SEAL] **United States Department of the Interior** [LOGO]
U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210 Fax: (602) 242-2513

In Reply Refer to:

AESO/SE
02-21-02-F-0268

September 26, 2002

Mr. Terry Oda, Manager
Clean Water Act Standards & Permits
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Oda:

This letter acknowledges the Fish and Wildlife Service's receipt of your June 21 and August 22, 2002, letters requesting initiation of formal section 7 consultation under the Endangered Species Act, as amended. The consultation analyzes the effects of the approval of Arizona's Pollution Discharge Elimination System program for all of Arizona, except on Indian lands, on federally proposed and listed species and proposed and designated critical habitat. The U.S. Environmental Protection Agency (EPA) concluded that the proposed action may affect, but is not likely to adversely affect, all listed species and critical habitat in Arizona, but also requested initiation of formal consultation for the action described in the Biological Evaluation (BE) and the preparation of a biological opinion.

At our September 13, 2002 meeting with you and the Arizona Department of Environmental Quality, (ADEQ) we state that we would make every effort to complete this consultation by November 1, 2002. We understood that a November 1 delivery of the opinion would be satisfactory to you, and that the ADEQ would be willing to grant an extension of the October 8 target date for completion of the delegation process. Given our need to conduct an extensive effects analysis, we do not anticipate providing a biological opinion prior to the November 1, date.

In keeping with our trust responsibilities to Native American Tribes, by this letter we will notify the Tribes which may be affected by this proposed action and encourage EPA to invite the Bureau of Indian Affairs to participate in the consultation process.

Also, as a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

We look forward to working with you on completion of this consultation. If we can be of further assistance, please contact Carrie Marr (x214) or Debra Bills (x239).

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ (Attn: M. Stegman)
Assistant Field Supervisor, Tucson Suboffice, Tucson, AZ
John Kennedy, Arizona Game and Fish Department, Phoenix, AZ
Karen Smith, Arizona Department of Environmental Quality, Phoenix, AZ
Director, Arizona Game and Fish Department, Phoenix, AZ
Regional Supervisor, Arizona Game and Fish Department, Tucson, AZ
Director, Navajo Fish and Wildlife Department, Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ
Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Nation, Camp Verde, AZ
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ
Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

W:\Debra Bills\water quality\aznpdesinitiatesept24.wpd:cgg

Sherry Barrett

10/26/2002 04:23 PM

To: Steve Spangle/R2/FWS/DOI@FWS, Mima Falk/R2/FWS/DOI@FWS, Scott Richardson/R2/FWS/DOI@FWS, Kim Hartwig/R2/FWS/DOI@FWS, Debra Bills/R2/FWS/DOI@FWS, Carrie Marr/R2/FWS/DOI@FWS, Steve Chambers/RO/R2/FWS/DOI@FWS, Sarah Rinkevich/RO/R2/FWS/DOI@FWS

cc:

Subject: NPDES analysis

Attached is my analysis of the direction that we are taking. Please provide comments.

Sherry

[File Image Omitted In Printing]
NPDES analysis.wpd

PREDECISIONAL COMMUNICATION – NOT FOR PUBLIC RELEASE

NPDES Transfer from the EPA to the State of Arizona

On October 25, 2002, we received direction from the Regional Director through Steve Chambers to proceed with the biological opinion for the delegation of the NPDES program from EPA to the State of Arizona Department of Environmental Quality (ADEQ) in the following manner:

1. There are indirect effects of the action on pygmy-owl and Pima pineapple cactus.

2. There will be no take of pygmy-owls as a result of this action because ADEQ will notify us of permits issued in pygmy-owl habitat, and ADEQ will notify the permittee that they need to comply with section 9 of the Endangered Species Act.

3. The permittees may pursue an incidental take permit under section 10(a)(1)(B) of the ESA if their action may result in take of pygmy-owls.

4. Because the permittees may pursue a section 10 permit under the ESA to address take, or FWS Division of Law Enforcement may enforce section 9 violations, take of pygmy-owls will not occur as a result of issuance of the permit.

5. Without take, the action cannot result in a jeopardy to the species.

6. Without take, the action cannot result in a jeopardy to the species.

The above directions are analyzed below:

1. There are indirect effects of the action on pygmy-owl and Pima pineapple cactus.

- We concur that the proposed action will result in indirect effects to both the pygmy-owl and the Pima pineapple cactus that are reasonably certain to occur (see preliminary analysis below). The issuance of permits will indirectly result in the development of habitat both occupied by and necessary for survival and recovery of the species. This analysis of indirect effects is consistent with *National Wildlife Federation v. Coleman* 529 F.2d 359 (5th Circuit 1976). In that case, the court enjoined completion of a highway because the Department of Transportation failed to consider the effects to the endangered sandhill crane from future private development that would result from construction of the highway.

2. There will be no take of pygmy-owls as a result of this action because ADEQ will notify us of permits issued in pygmy-owl habitat, and ADEQ will notify the permittee that they need to comply with section 9 of the Endangered Species Act.

- The regulations at 50 CFR 402.14(i) state that: "In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), the Service will provide with the biological opinion a statement concerning incidental take.

- Arguing that there will be no incidental take resulting from the action is contrary to the regulations, because in this case there is reasonable certainty that the take will occur. Based on the above argument, we would not need to anticipate incidental

take in any of our biological opinions, because if it were to occur, it would be enforced at that time by our Division of Law Enforcement. Clearly, this was not the intent of the regulations.

3. There will be no take of pygmy-owls as a result of this action because ADEQ will notify us of permits issued in pygmy-owl habitat, and ADEQ will notify the permittee that they need to comply with section 9 of the Endangered Species Act.

- The logic perceived behind this statement is that, because the applicant to the NPDES permit has been notified that the action is within an area inhabited by the pygmy-owl, the applicant will also seek a section 10 permit under the ESA to ensure unauthorized take does not occur.

- To date, law enforcement has been unwilling to pursue such cases even when housing developments, schools and commercial projects are constructed within pygmy-owl breeding territories.

- Pursuing future HCP's with private developers is strictly a voluntary process; without the probability of 'take' liability, landowners see no benefit in pursuing the HCP's. We have approached four developers with projects occurring within or adjacent to pygmy-owl territories; they declined our recommendation to develop HCPs, and several of those areas are now mass graded.

- We have completed one HCP in northwest Tucson and are working with another private developer to complete their HCP. We are working with Pima County, the Town of Marana, and the Altar Valley Alliance to develop regional HCP's. All are in the planning phases.

4. Because the permittees may pursue a section 10 permit under the ESA to address take, or FWS Division of Law Enforcement may enforce section 9 violations, take of pygmy-owls will not occur as a result of issuance of the permit.

- Based on our preliminary analysis of the direct and indirect effects of the action, incidental take of pygmy-owls is reasonable certain to occur. This take would, at a minimum, be in the form of harm and harassment, but may also be in the form of direct mortality and injury. Based on the conclusions of the Solicitors following the Arizona Cattle Growers Association Case (memo dated June 25, 2002), we should provide an incidental take statement in the biological opinion if take is reasonably certain to occur.

5. Without take, the action cannot result in a jeopardy to the species.

- The survival and recovery of a species cannot be premised on the enforcement of take prohibitions. In the case of the pygmy-owl, there are only 18 documented individuals in the DPS, 7 of which occur in the breeding group in NW Tucson. Protecting these 7 individuals through enforcement of section 9 would at a maximum ensure the remainder of 7 territories surrounded by development. But, in fact, our Division of Law Enforcement has not taken cases of development proposed within these territories unless we have photographs of the pygmy-owl on a particular parcel of land. Therefore, the real result may mean that the nest tree or saguaro occupied by an owl may be protected through section 9 enforcement. In the case of the Pima pineapple cactus, there is no section 9 protection for plants on non-Federal land.

- As demonstrated below in quotations from both the Regulations that implement section 7 of the Endangered Species Act and the Service's Consultation Handbook, the clear intent of assessing whether or not an action was likely to jeopardize the continued existence of a species was not equivalent to anticipating whether or not take was reasonably certain to occur.

- The term "Jeopardize the continued existence of" is defined in the Regulations as "to engage in an action that reasonably would be expected, directly, or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."

- The Handbook, page 4-35, defines "Survival" as "the species persistence, as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficiently large population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

- The Handbook, on page 4-35 states that "the final analysis then looks at whether, given the aggregate effects, the species can be expected to both survive and recover, as those terms are defined above. For the jeopardy analysis, this survival is framed in terms of the species' reproduction, numbers, and distribution."

- The preamble to the Regulations, on page 19934 states that "The 'continued existence' of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' 'survival.' However, significant impairment of recovery efforts or other adverse effects which rise to the level of "jeopardizing" the continued existence of a listed species can also be the basis for issuing a 'jeopardy' opinion. The Service acknowledges that, in many cases, the extreme threats faced by some listed species will make the difference between injury to 'survival' and to 'recovery' virtually zero."

- The preamble to the Regulations, on page 19934 states "the very concept of 'jeopardy' is that a Federal agency should not authorize, fund, or carry out an action that would injure a listed species' chances for survival to the point that recovery is not attainable.

- The preamble to the Regulations on page 19935 states ". . . habitat destruction can be the basis for a jeopardy opinion in appropriate cases."

- The preamble to the Regulations (page 19954) states that [The] provision for incidental take in no way affects a Federal agency's responsibility under section 7(a)(2) to ensure that its action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

- The preamble to the Regulations states (page 19954) that "the amount or extent of take should not be set at the threshold of likely jeopardy. If the establishment of such a high taking level were necessary to cover all impacts of a proposed action, it is questionable whether the issuance of a 'no jeopardy' opinion is appropriate.

- In the case of the NPDES transfer, we anticipate that all pygmy-owls in NW Tucson, and possibly at the northern edge of the Altar Valley would be incidentally taken as a result of the action.

6. Without take, the action cannot result in a jeopardy to the species.

- The take prohibitions for pygmy-owl will not provide protection for the Pima pineapple cactus. Occupied habitat for the pygmy-owl and the Pima pineapple cactus are only known to overlap in the Altar Valley. There are no Pima pineapple cactus in NW Tucson, where the majority of the indirect effects of the NPDES program will affect the pygmy-owl, and there are no current records of the pygmy-owl in Green Valley, where the majority of the indirect effects of the NPDES program will affect the Pima pineapple cactus.

- Within the next 20 years, development is likely to proceed in the northern end of the Altar Valley where both pygmy-owls and Pima pineapple cacti occur. However, the prohibitions of take for the pygmy-owl are not likely to provide protection to the cactus due to the limited numbers of pygmy-owls in this area and the difficulties in demonstrating that take is reasonably certain to occur. In addition, pygmy-owls in the Altar Valley spend the majority of their time in tree-lined drainages within this grassland community, whereas Pima pineapple cacti are found on the upland benches above the drainages.

Preliminary Analysis of Indirect Effects

The historical range of the pygmy-owl includes portions of Maricopa, Pinal, Cochise, and Pima counties. The pygmy-owl is known to be extant only in Pima and Pinal counties.

The historical range of the Pima pineapple cactus includes portions of Pima and Santa Cruz counties. Pima pineapple cactus remains extant in both counties.

For both species, the analysis of indirect effects of the action are focused on Pima County, because the majority of the remaining populations of both species occur in Pima County, and Pima County has developed the most robust assessment of projected growth patterns of the counties of concern.

Most current development in eastern Pima County has been occurring in the NW Tucson/Marana area and in SE Tucson/Sahuarita. Effects of development to the pygmy-owl have been most severe in NW Tucson/Marana area, and are expected to increase significantly elsewhere, especially in Pinal County and the north end of the Altar Valley.

These areas of current and expected high development are mostly comprised of private lands with some parcels of State Trust lands.

In their *Cost Model for Section 10 Endangered Species Act Compliance for all Impacts in the Unincorporated Area of Pima County* (May 23, 2002), Pima County conservatively estimates a population increase over the next 20 years of 100,000 people in unincorporated areas of eastern Pima County (The Pima Association of Governments estimated a population increase of 36,680 over the next twenty years, with more than half of that amount (just over 19,000) arriving in the next decade). This population increase would require 44,843 new housing units. At current densities of 3,000 persons per square mile, the footprint of this growth will be 33.3 square miles.

Pygmy-owl.

The pygmy-owl exists in four known breeding groups in Arizona: Organ Pipe Cactus National Monument, Altar Valley, NW Tucson, and southern Pinal County. There is likely a fifth breeding group on the Tohono O'odham Nation, but the numbers and distribution of pygmy-owls on the Nation are not known.

NW Tucson is roughly described as east of Interstate 10, north of Cortaro Farms Road, west of La Cholla Boulevard, and south of 13600 N street alignment to the north. Contrary to its name, this area is mainly within the jurisdictions of Pima County and the Town of Marana.

Pima County estimates that there are 4,063 acres of private vacant land (859 parcels) and 996 acres of State vacant land within unincorporated areas of NW Tucson. Based on the total of approximately 5000 acres of unincorporated Pima County lands in NW Tucson, Pima County estimates that 3,185 people could populate this area over the next 20 years, requiring 1,428.5 homes. Pima County expects that the entire 4,063 acres would be developed within the next 20 years (Maeveen Behan, Pima County, pers. comm).

For the Town of Marana, the Pima Association of Governments (PAG) estimates a population increase over the next 20 years of 50,000. The Town of Marana estimates that 20 percent of that population growth (10,000-15,000) will occur in the NW Tucson area. The footprint of this growth is estimated to be 5,000 to 6,000 acres (Andy Laurenzi, Town of Marana, pers. comm.).

There are a total of 33,423 acres of land within the jurisdictions of Pima County and the Town of Marana in

NW Tucson,, much of which of which has already been developed at high densities. The private lands in NW Tucson within the jurisdictions of Pima County and the Town of Marana total 21,292 acres. Combining the growth estimates of Pima County and the Town of Marana, there are approximately 11,000 acres of land anticipated to be developed in the next 20 years in NW Tucson.

Developments that result in greater than 5 acres of grading require either an individual permit under section 402 of the Clean Water Act or authorization under the CWA Construction General Permit. Transfer of the NPDES will therefore result in the following indirect effects to the pygmy-owl:

The survival of the pygmy-owl will be compromised through the development of habitat around current nest sites. This loss, degradation and fragmentation of habitat will preclude the ability of the pygmy-owl to disperse from nest sites to establish new territories and to reoccupy vacated territories. Isolation of these nesting sites by development will also preclude the ability of pygmy-owls to find mates. Without the ability to establish new territories or maintain existing territories, the overall survival of this breeding group is not likely to persist. The loss of this breeding group in Arizona will jeopardize the continued existence of the species in AZ because of the following factors:

> Distribution: The loss of the breeding group in NW Tucson would significantly reduce the distribution of the pygmy-owl in Arizona. The NW Tucson breeding group represents 1 of 4 recognized breeding groups in Arizona. Because NW Tucson provide an important connection between pygmy-owls in southern Pinal County and those east of Interstate 10, loss of this

breeding group would also likely result in the eventual extirpation of pygmy-owls in southern Pinal County, further reducing the remaining distribution of the species.

Numbers: The NW Tucson breeding group represented 35 percent of the known population and 40 percent of the known nesting sites in AZ in 2001. Loss of these pygmy-owls to the DPS would represent a significant reduction in the overall population and appreciably reduce the species likelihood of survival and recovery.

Reproduction: The NW Tucson breeding group has produce 3.3 nests/year and total young of 12.6/year, which has resulted in 3.8 young/nest/year. This productivity is higher than any of the other 3 known breeding groups in the State and important to the overall ability of the species to survive and recover.

Pinal County encompasses 5,370 square miles north of Pima County. Private lands account for 35.3 percent of Pinal County and State Trust lands account for 35.3 percent. Pinal County's 2001 Comprehensive Plan states that the county is experiencing rapid growth and transition from a primarily agricultural center to a commercial, industrial and recreational one. In 2001, the population of the county total 179,727. From 1990 to 2000, the population of Pinal County increased 54.4 percent, a rate higher than the state wide percent change of 40 percent. Pinal county projects a 60 percent increase in population in the next decade with annual growth projected at 2.8 percent. Urban areas are currently experiencing the most intense commercial and residential development, but the Comprehensive Plan anticipates that

many rural areas will grow rapidly in the next decade *(Pinal County Comprehensive Plan*, January 19, 2002).

Pima pineapple cactus

The Pima pineapple cactus occurs in a restricted range within Pima and Santa Cruz counties. Major population areas are located in Green Valley and the Altar Valley. The species is affected by development mostly in Green Valley along the Interstate 19 corridor in Pima County and the Town of Sahuarita.

Similar to the analysis of the pygmy-owl above, the Pima pineapple cactus will be adversely affected by the indirect effects of the development that will result from the issuance of NPDES permits.

Pima County's Sonoran Desert Conservation Plan anticipates increased development in the SE Tucson/Green Valley areas, as these areas are accessible to infrastructure and water. This increased development will directly affect Pima pineapple cactus, which occurs generally in the most developable portions of land (e.g., out of the drainages and off of the steep slopes).

Gary D Frazer

09/27/2002 08:14 AM

[Image Omitted In Printing]

To: Craig Manson/ASFW/OS/DOI@DOI

cc: David P Smith/ASFW/OS/DOI@DOI, Clint Riley/ARL/R9/FWS/DOI@FWS, Patrick Leonard, Elizabeth Stevens/ARL/R9/FWS/DOI@FWS

Subject: Consultation on AZ NPDES delegation

Knowing of your interest in this, Dale Hall asked me to pass on that EPA has backtracked on their commitment to consider both the direct and indirect effects of permits issued in any consultation with the Service or negotiation with the state relating to the AZ NPDES program delegation. They told Dale this week that they will only address impacts to listed species directly related to water quality. This is at odds with the MOA we have with EPA and, of course, the sec 7 regs. May be something for which we'll have to engage with EPA HQ in the future, if Dale is unable to get them back on track. – GDF

DATE: October 9, 2002

BRIEFING FOR THE ASSISTANT DIRECTOR FOR ENDANGERED SPECIES

PREPARED BY: Michael Horton, National Section 7 Coordinator, Branch of Consultation and HCPs

FROM: Patrick Leonard, Chiefs Division of Consultation, HCPs Recovery, and State Grants

SUBJECT: Elevation of EPA's proposed approval of Arizona's NPDES permitting Program

PURPOSE: To explain EPA's and Region 2's positions on this issue and the broader implications

ISSUES: The Clean Water Act (CWA) MOA signed between the EPA and Service in 2001, includes a commitment by EPA to consult under section 7 of the ESA whenever it considers delegating the CWA section 402 program to State or Tribal authorities. The MOA also establishes a process whereby once the NPDES permitting process is assumed by a State, the Service reviews and comments on individual permit requests and objects to those that will have inappropriate effects to listed species. This provides the opportunity for the State and Service to resolve permit issues that may affect listed species. In the event that such resolution cannot be achieved, and if issuance of the proposed permit would result in "more than minor" adverse effects, the Service can request that EPA federalize the permit, thus making it subject to the requirements of section 7.

In Arizona there are at least two upland species that will be affected by the transfer of the NPDES program; the cactus ferruginous pygmy-owl and Pima pineapple cactus. However, the potential impacts of concern are non-water quality related impacts from future projects (e.g., construction impacts, water usage, etc.). Notwithstanding the assertion in the MOA that EPA's CWA authorities are sufficiently broad and the MOA sufficiently flexible to address the broad range of situations that arise in the NPDES program, EPA now asserts that based on the 1998 5th Circuit Court of Appeals' decision (AFPA v. EPA, 137 F.3d 291), they have no authority to federalize permits because of non-water quality effects to listed species. In this case the Circuit Court ruled that the plain language of section 402(b) of the CWA directs EPA to approve proposed State programs that meet certain identified criteria and that approval of such programs is non-discretionary; in other words, if the program meets the nine criteria identified in section 402(b) of the CWA, the Administrator of EPA must approve the State's program. Finally the Court ruled that EPA cannot use the ESA to impose requirements that are not authorized by the CWA.

The Service argues that due to EPA's position that once the program is assumed by the State EPA lacks the authority to object to future permits based on upland impacts to species, there will be a reduced level of protection for listed upland species that we know are adversely affected by projects that cannot move forward without NPDES permits. This reduction in protection may result in a jeopardy determination on EPA's proposed approval of the State's program.

Section 7 Implications: While EPA may argue that they have no discretion to address non-water quality

related upland impacts to listed species, they do have discretion to address issues. relating to both aquatic and upland listed species if they are water quality-related. Therefore, as long as the transfer of an NPDES process to a State will affect at least one aquatic listed species or an upland listed species that may be impacted by poor water quality, the transfer qualifies as a discretionary action subject to section 7 consultation regardless of EPA's position. Once section 7 is initiated, the Service must analyze all potential effects (i.e., direct, indirect, and cumulative effects). When analyzing indirect effects, the action agency's ability to control those effects is irrelevant to the analysis; in other words, if indirect effects that the action agency has no control over will result from the action, these effects must be analyzed. This could result in a jeopardy determination with no RPA as there may be nothing within the action agency's authorities that they can do to avoid jeopardy. If this is the case, when the State proposes to assume the NPDES program, using EPA's thought process, they would either have to transfer the program and be in violation of section 7(a)(2) of the ESA, or comply with section 7(a)(2) and be in violation of the CWA. The only apparent remedy would be for EPA to be granted an exemption via the ESA Exemption process (note that since there is no exemption process in the CWA for such situations, seeking an exemption from the requirements of the CWA does not appear to be an option).

MAIN DECISION OR MESSAGE: EPA's position, based on this interpretation of the 5th Circuit Court decision, would appear to create the potential for a conflict between the ESA and CWA that could only be remedied through the issuance of an ESA Exemption.

BUREAU PERSPECTIVE: The MOA signed by EPA and the Service in January, 2001, clearly committed the agencies to applying the section 7 regulations, including analysis of indirect effects, to any future assumptions of the NPDES program.

CONTACTS: Rick Sayers, Chief, Branch of Consultations and HCPs, 703/358-2442, Michael Horton, National Section 7 Coordinator, Branch of Consultations and HCPs, 703/358-2371.

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[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

October 16, 2002

Mr. Steven Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Rd.
Suite 103
Phoenix, AZ 85021

In reply, refer to WTR-5

Dear Mr. Harlow [sic]:

As you know, the State of Arizona, in accordance with the provisions of Clean Water Act Section 402(b), is requesting approval from the USEPA for the Arizona Department of Environmental Quality (ADEQ) to administer the National Pollutant Discharge Elimination System Program. The USEPA is currently in formal consultation with the U.S. Fish and Wildlife Service (Service) under Section 7 of the federal Endangered Species Act (ESA) on the effects of the USEPA's proposed approval of the Arizona Pollutant Discharge Elimination System (AZPDES) program on Federally-listed endangered and threatened species and designated critical habitat.

The purpose of this letter is to provide you with the ESA-related comments that we received during the public comment period for the proposed approval of the AZPDES program. We are sharing these comments with you so that you may take them into consideration during the consultation. The comments are as follows:

- a letter from the Navajo Nation dated September 16, 2002
- a letter from the Arizona Chamber of Commerce and the Greater Phoenix Chamber of Commerce dated September 14, 2002
- a letter from the Arizona Center for Law in the Public Interest dated September 13, 2002
- a letter from Whitey Anderson and Morris dated September 13, 2002
- a letter from Diamond Ventures Inc. dated September 9, 2002
- a letter from Mr. Bruce Nigel dated September 7, 2002
- a letter from the Arizona Association of Industries dated September 6, 2002
- a letter from the Home Builders Association of Central Arizona

If you have any questions, please contact Jenny Mann at 415-972-3512 or mann.jenny@epa.gov.

Sincerely,

/s/ [Illegible]
Terry Oda, Manager
CWA Standards and Permits Office

Enclosures

DATE: October 17, 2002

BRIEFING FOR THE SECRETARY

PREPARED BY: Steven Chambers, Senior Scientist, U.S. Fish and Wildlife Service, Region 2, Albuquerque, NM.

FROM: Dale Hall, Regional Director, U.S. Fish and Wildlife Service, Region 2,

SUBJECT: EPA's proposed approval of Arizona's NPDES (National Pollution Discharge Elimination System) permitting program

PURPOSE: To identify EPA and Service positions on this issue and their implications.

ISSUES: The Clean Water Act (CWA) MOA signed by EPA and Service in 2001 includes a commitment by EPA to consult under section 7 of the Endangered Species Act (ESA) whenever it considers approval of assumption of the NPDES permitting program by a State or Tribe. The MOA also establishes a process whereby once the NPDES program is assumed by a State, EPA and the Service will work together to identify permits that have more than a minor detrimental effect on listed species, and work with the State to reduce those effects. If issues are not resolved, the Service can request that EPA object to, and if necessary, federalize the permit.

Two upland species in particular will be affected by the transfer of the NPDES program in Arizona: the cactus ferruginous pygmy-owl and Pima pineapple cactus. The potential impacts are indirect, non-water quality related impacts from future projects (e.g., construction impacts amd [sic] water usage). Although the MOA identifies an objective to protect listed species and their critical habitat,

EPA now asserts based on the 1998 5th Circuit Court of Appeals' decision (AFPA v. EPA, 137 F.3d 291), that they have no authority to object to permits based on non-water quality effects to listed species.

Once section 7 is initiated, the Service must analyze all effects, including those that are indirect. The indirect effects of future permitted actions could result in a jeopardy biological opinion on EPA's approval of the assumption by Arizona. If, as they assert, EPA lacks the authority to address these indirect effects, then there could be no reasonable and prudent alternative to the proposed action that would avoid jeopardy. The ESA provides for proceeding with such an action only through the ESA's exemption process.

MAIN DECISION OR MESSAGE: EPA's position creates a conflict between the ESA and CWA that could only be remedied through the issuance of an ESA Exemption.

BUREAU PERSPECTIVE:
The MOA between EPA and the Service clearly committed the agencies to applying the section 7 regulations, including analysis of indirect effects, to future assumptions of the NPDES program.

CONTACTS: Bryan Arroyo, Assistant Regional Director-Ecological Services, U.S. Fish and Wildlife Service, Region 2: 505-248-6454.

THE STATE OF ARIZONA
GAME AND FISH DEPARTMENT
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[LOGO]

Governor
Jane Dee Hull
Commissioners
Chairman,
Michael M. Golightly,
Flagstaff
Joe Carter, Safford
Susan E. Chilton, Arivaca
W. Hays Gilstrap, Phoenix
Joe Melton, Yuma
Director
Duane L. Shroufe
Deputy Director
Steve K. Ferrell

[SEAL]

November 18, 2002

Mr. Steve Spangle
Field Supervisor
Arizona Ecological Services Field Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

Re: Draft Biological Opinion on the Transfer of the National Pollutant Discharge Elimination Program to the State of Arizona

Dear Mr. Spangle:

The Arizona Game and Fish Department (Department) completed a cursory review of the draft Biological Opinion (BO) on the Transfer of the National Pollutant Discharge Elimination System. (NPDES) Program from the Environmental Protection Agency (EPA) to the Arizona Department of Environmental Quality (ADEQ).

The administration of the NPDES Program by the ADEQ has the potential to improve interagency coordination, environmental reviews, and the overall quality of NPDES permits in Arizona. The conservation measures outlined in the Draft BO, consistent with the National Memorandum of Agreement (MOA) signed by EPA, USFWS and NMFS, should ensure the conservation of federally-listed species and designated Critical Habitats.

During the last few years, ADEQ and the Department have worked cooperatively in the review of Notices of Intent, and draft and final NPDES permits to ensure that potential impacts to fish and wildlife resources are considered and addressed. The Department provides information regarding the occurrence of special status species, potential adverse impacts to fish and wildlife resources, including listed species, and recommendations to avoid or minimize impacts to those resources. The Department is committed to continuing this level of involvement during the review of future NPDES permits and working cooperatively with ADEQ, USFWS, and EPA to develop measures that avoid and/or minimize impacts to fish and wildlife resources. We will also continue to seek opportunities to enhance fish and wildlife habitats through our work with ADEQ and the NPDES program.

The Department agrees with the USFWS that the transfer of the NPDES program to ADEQ will result in improved water quality conditions and coordination among agencies.

Please contact Bob Broscheid at (602) 789-3605 if you have any questions regarding this letter.

Sincerely,

/s/ John Kennedy
John Kennedy
Habitat Branch Chief

JK:bb

cc: Terry Johnson, Nongame Branch Chief
Larry Riley, Fisheries Branch Chief
Regional Supervisors
Bob Broscheid, Project Evaluation Program Supervisor, Habitat Branch
Karen Smith, Director, Water Quality Division, ADEQ

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

NOV 20 2002

VIA FACSIMILE AND U.S. MAIL

Steven L. Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Road
Suite 103
Phoenix, AZ 85021

Re: EPA Comments on FWS Draft Biological Opinion for EPA's Proposed Approval of the Arizona NPDES Program

Dear Mr. Spangle:

This letter provides EPA's comments on the draft Biological Opinion (80) prepared by the U.S. Fish and Wildlife Service (Service) pursuant to Section 7 of the Endangered Species Act (ESA) for EPA's proposed approval of the Arizona NPDES (AZPDES) Program. This draft was transmitted to EPA on November 14, 2002. Our primary comment are described first, and are focused on the elements of a biological opinion as described in the ESA section 7 regulations at 50 C.F.R. Part 402. Prior to your finalizing the biological opinion, we would appreciate the opportunity to discuss with your office the manner in which the Service plans to address these comments, as well as the opportunity to review a revised draft of the opinion. We will contact your office shortly to set up a time to discuss these comments.

First, the ESA consultation regulations at 50 C.F.R. section 402.14(h)(1) state that the biological opinion shall include a summary of the information on which the opinion is based. The draft BO does not appear to provide a clear summary of such information; this should be added to the final opinion.

Second, the ESA consultation regulations at 50 C.F.R. section 402.14(h)(2) and (h)(3) state that the biological opinion shall include a detailed discussion of the effects of the action on listed species or critical habitat, as well as the Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or adverse modification of critical habitat. The Service concludes in the "Effects of the Action" and "Conclusion" sections of the draft BO that EPA's proposed approval action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat, that development is not an indirect effect of EPA's approval action, and that the loss of section 7-related conservation benefits is not an indirect effect of EPA's approval of the AZPDES program. We agree with these conclusions; however, we believe that the Effects of the Action section should provide a more detailed explanation of the basis for the Service's conclusions.

Third, the biological opinion should provide a detailed discussion of the action under consideration in this consultation. Through the AZPDES program, the Arizona Department of Environmental Quality (ADEQ) will issue permits for discharges of pollutants from point sources to waters of the United States. EPA's Biological Evaluation (BE) discusses in detail what the AZPDES program regulates and how the safeguards in the Clean Water Act (CWA) and the AZPDES program, and EPA's oversight of

the AZPDES program, will provide continued protection to Federally-listed species and their critical habitat following program approval. While the "Conservation Measures" section of the document discusses EPA's oversight of the AZPDES program, to make clear the scope of EPA's action, the final Biological Opinion's (BO) "Description of the Proposed Action" section should include a discussion of what the AZPDES program regulates and the fundamental protections to be provided by the AZPDES program.

For example, the AZPDES permits must attain State water quality standards, which are developed by considering, among other things, the propagation of fish and wildlife. EPA completed section 7 consultations with the U.S. Fish and Wildlife Service (Service) on Arizona water quality standards an February 16, 1994 and on December 11, 1998. EPA will continue to consult with the Service under ESA section on its proposed approval of new or revised Arizona water quality standards that may affect listed species or designated critical habitat.

In addition to discharge limitations, NPDES permits impose other requirements such as monitoring procedures and pollution prevention measures (known as best management practices). Permits typically contain technology-based limits which represent the best conventional technology (BCT) for conventional pollutants (biological oxygen demand, total suspended solids, fecal coliform, pH, and oil and grease), best available technology economically achievable (BAT) for non-conventional and toxic pollutants, secondary treatment limits for publicly owned treatment works (POTWs), and new source performance standards (NSPS) for new sources. Where technology-based or secondary

treatment limits are not sufficient to meet WQS in receiving waters, permits must contain more stringent limits (known as water quality-based effluent limits or WQBELs) so that the receiving waters meet those WQS. The CWA requires that NPDES permits contain effluent limitations that contribute to the maintenance and attainment of water quality which assures the protection and propagation of a balanced population of shellfish, fish and wildlife.

Fourth, EPA's BE states that EPA believes that its proposed approval action may affect Federally-listed species and critical habitats in, adjacent to, or dependant on surface waters in Arizona. All relevant sections of the final BO should discuss Federally-listed species and designated critical habitats in, adjacent to, or dependent on surface waters in Arizona to make clear the Service's opinion about the effects of EPA's program approval action on these species.

Among other things, the "Status of the Species and Environmental Baseline" section of the opinion should include a brief discussion of the listed species and critical habitat that may be affected by the action, including Federally-listed species and designated critical habitats in, adjacent to, or dependent on surface waters in Arizona. The draft opinion appears to focus heavily on a discussion of past conservation activities of EPA and FWS that will benefit two species that the Service concludes will not be affected by the proposed action, but does not provide much background on the status of or baseline for those or other species. The draft appears to seek to incorporate by reference information relating to the status of the species. If such an approach is taken in the final opinion, the opinion should be more specific so that the reader can

determine the precise documents and information to which the opinion refers and how such material in relevant to the opinion.

Fifth, in various parts of the document, the Service's discussion refers to listed species but does not refer to designated critical habitat. The final BO should make clear the Service's analysis and conclusions regarding the effects on designated critical habitat for listed species as well as the species themselves.

Sixth, much of the discussion in the "Introduction" section does not appear to be critical to the conclusions in the consultation. If the Service wishes to include the discussion in the final opinion, the discussion appears to be part of the consultation history, thus the discussion seems more appropriate for that section of the document rather than the Introduction. In addition, EPA funding for the AZPDES program is an issue that our agencies have discussed previously, and reference to this issue in the biological opinion is inappropriate and should be deleted.

Our other comments are as follows:

First paragraph of the draft document: This paragraph states that the "program transfer is required under the Clean Water Act (CWA)." We suggest that this be clarified to state that CWA section 402(b) states that EPA "shall approve" a State NPDES program where the State program meets the conditions specified in CWA section 402(b) and its implementing regulations.

First paragraph of the "Introduction" section: This paragraph indicates that it is describing the contents of the letter that was sent from the Service to EPA dated August 20, 2002, as well as the contents of the letter that

was sent from EPA to the Service on August 22, 2002. However, the paragraph does not accurately reflect the contents of either letter. If the final BO includes a discussion of the contents of these letters, the text should correct these inaccuracies. In addition, the statement in the last sentence attributed to EPA is not accurate; EPA has authority to "Federalize" State permits where they are inconsistent with Clean Water Act requirements, including water quality standards.

Second paragraph of the "Introduction" section: This paragraph, and the second paragraph of the "Description of the Proposed Action" section, should make clear that ADEQ has *voluntarily* proposed to both provide copies of certain NOIs to the Service and send FWS form letters to NOI submitters.

Third paragraph of the "Introduction" section: In this paragraph, as well as the final paragraph of the "Effects of the Action" section, the reference to the "action of authority transfer considered in this consultation" should be replaced by "the program approval action considered in this consultation."

Also, the reference to ADEQ should be removed. ADEQ is not a party to the National MOA.

"Consultation History" section: The draft states that the Service initiated formal consultation on September 26, 2002. We believe that it would be more accurate to state that on that date, the Service acknowledged EPA's request for formal consultation.

"Conservation Measures" section: In the first sentences of the first and third paragraphs in the Conservation Measures section of the document, the

phrases "that may be affected by water quality impacts," and "that may be affected by water quality," respectively, should be deleted. EPA Region 9 has agreed to use the coordination process in Section IX of the National MOA to attempt to address concerns about any and all Federally-listed species and critical habitat associated with AZPDES permits, not just those species that may be affected by water quality. However, as we have pointed out, EPA does not have CWA authority to object to State NPDES permits to address non-water-quality-related concerns about listed species or critical habitat.

Similarly, the last sentence of the Conservation Measures section of the draft BO states that EPA acknowledges that the MOA process does not cover upland, terrestrial species as it considers them to be outside of its CWA authority. This is incorrect. As stated above, EPA Region 9 has agreed to follow the coordination process for AZPDES permits where there are concerns about upland, terrestrial species, while noting that it does not have CWA authority to object to State NPDES permits to address non-water-quality-related concerns about listed species or critical habitat. We believe the sentence should be corrected accordingly.

"Status of the Species and Environmental Baseline" section: The first two sentences of the third paragraph of this section (starting with "[t]he EPA currently considers") do not appear to be entirely accurate. We suggest replacing them with the following: "EPA currently conducts ESA section 7 consultations on its own NPDES permitting actions in Arizona where it finds that its action may affect listed species or critical habitat. Its consultations have considered all effects of the Federal permitting action, including indirect effects and the effects

of interrelated and interdependent actions. Effects considered have included, in some cases, construction activities and ground water pumping."

Also, the second-to-last paragraph of this section of the draft states that out of 104 NOIs received for authorization under the construction storm water permit, 72 "are a concern" for either the Pima pineapple cactus, the pygmy-owl, or both. We believe that it would be more accurate to state that the Service "believes that the NOIs may be a concern" for such species. Correspondence from the Service to EPA dated November 8, 2002 states that of 110 NOIs submitted to the Service as of November 6, 2002 for projects in Pima and Pinal counties, Arizona, "74 NOIs may have endangered species concerns based on the location information provided. However, since details outlining the projects are not provided, we do not have the ability to fully evaluate potential species concerns. Given the information provided, the enclosed table represents projects permitted by the NOI's that may be of concern."

In addition, we suggest that the first sentence of the final paragraph of this section be modified to read as follows: "In summary, the EPA has conducted a number of ESA section 7 consultations with FWS on NPDES permits in Arizona, including permits for projects requiring Federal NPDES permit coverage for storm water discharges from construction activities, and such consultations have in appropriate cases addressed effects of construction activities."

"Effects of the Action" section: In the final paragraph of the section, the word "on" should be inserted before "August 22, 2002."

"Cumulative Effects" section: We believe that it would be appropriate to include a brief discussion of the Sonoran Desert Multi-Species Conservation Plan in this section.

"Conclusion" section: In the final paragraph of the section, the word "transfer" should be changed to "approval."

Finally, ADEQ requested that we convey its comments on the draft opinion to you. We have enclosed ADEQ's comments, and concur with them.

We look forward to speaking with you soon about our comments.

Sincerely,

/s/ Terry Oda
Terry Oda, Manager
CWA Standards and Permits Office

Enclosure

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
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DEC 02 2002

VIA FACSIMILE AND US. MAIL

Steven L. Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Road
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Phoenix, AZ 85021

Re: EPA Comments on FWS Revised Draft Biological Opinion for EPA's Proposed Approval of the Arizona NPDES Program

Dear Mr. Spangle:

This letter provides EPA's comments on the revised draft Biological Opinion (BO) prepared by the U.S. Fish and Wildlife Service (Service) pursuant to Section 7 of the Endangered Species Act (ESA) for EPA's proposed approval of the Arizona NPDES (AZPDES) Program. This draft was transmitted to EPA on November 27, 2002. We appreciate the revisions in the draft based on your consideration of the comments that we sent to your office on November 20, 2002. The following are our remaining comments, most of which are tied to the revisions that were made in the November 27 draft.

1. The ESA consultation regulations at 50 C.F.R. section 402.14(h)(2) state that the biological opinion shall include a detailed discussion of the effects of the action on listed species or critical habitat. We believe that the

revised draft provides a fuller explanation of the Service's analysis supporting the Service's conclusions that EPA's proposed approval action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat, that development is not an indirect effect of EPA's approval action, and that the loss of section 7-related conservation benefits is not an indirect effect of EPA's approval of the AZPDES program. However, we believe that additional elaboration in the opinion regarding the Service's analysis and conclusions is appropriate.

First, your November 27, 2002 cover letter states that the Service believes that the biological effects of EPA's approval action will be minimal due to the administrative nature of the proposed action. The Effects of the Action section of the revised draft opinion does not discuss direct effects of the action; we assume that this means that the Service believes that EPA's proposed approval of the AZPDES program will have no direct effects on listed species or proposed or designated critical habitat due to the administrative nature of the approval action. If this is the case, the opinion should make this clear. If not, the opinion should explain what the direct effects of the action are and how the Service's analysis of those effects leads to the Service's conclusion that EPA's proposed approval action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat.

In addition, in discussions with your office throughout the consultation process, the Service has indicated to us that it believes that any potential effects (presumably indirect) on listed species or critical habitat stemming from water quality issues associated with EPA's approval

of the AZPDES program are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated or proposed critical habitat, in light of the continuing protections of the CWA, AZPDES program, and EPA's oversight of the AZPDES program, including the EPA-Service procedures outlined in the National MOA (these protections are described in EPA's Biological Evaluation and in the Description of the Proposed Action section of the revised draft opinion). However, the Effects of the Action section of the revised draft opinion focuses on possible indirect effects associated with loss of conservation benefit and development, and contains no specific mention of the Service's findings regarding potential effects on listed species or critical habitat stemming from water quality issues associated with EPA's approval of the AZPDES program.

To make clear the Services analysis and conclusions, we believe that the Effects of the Action section of the opinion should include, perhaps after the first paragraph, at least a brief statement regarding the Service's analyses and findings pertaining to possible direct effects of the action and to potential indirect effects of the action stemming from water quality issues.

2. The first sentence of the fifth paragraph of the Effects of the Action section of the revised draft refers to "permit requests from AZPDES." As ADEQ issues permits pursuant to the AZPDES program, we believe that the correct term would instead be "permit requests under the AZPDES program."

3. The conclusion of the revised draft opinion is clear that the Service believes that EPA's approval action is not

likely to destroy or adversely modify designated or proposed critical habitat. As you know, critical habitat for the cactus ferruginous pygmy-owl was recently proposed by the Service. We believe it would be appropriate to include references to proposed or final critical habitat for the pygmy-owl and/or other species, as appropriate, to the discussion in the Effects of the Action action section of the document.

4. The third paragraph of the Description of the Proposed Action section refers to the "coordination process" but does not specify which coordination process it refers to. We suggest that the reference to "coordination process" language be changed to read "National MOA coordination process described in detail below."

5. The Consultation History section of the document includes a statement regarding discussions between our agencies concerning EPA funding of the AZPDES program. In addition, the Description of the Proposed Action section of the document refers to various State NPDES programs receiving Federal funds. As EPA finding of the State NPDES programs is not the subject of this consultation, it is irrelevant to the consultation and therefore reference to it should be removed from the opinion.

6. The last sentence in Section III.B of the Description of the Proposed Action section is repetitive and confusing to the reader, and should be removed.

7. The phrase "unless exempted under the general permit" should be added to the end of the first sentence of the second paragraph of Section IV.B of the Description of the Proposed Action section of the opinion.

8. In the fourth sentence of the fourth paragraph of Section VI.B of the Description of the Proposed Action section of the document, the phrase "will review NOI" should be replaced by "may review NOIs."

9. At the end of the first paragraph of the opinion, the word "letter" should be replaced by "opinion."

10. There is no Section II in the Description of the Proposed Action section of the document.

11. References in the revised draft opinion to EPA "authorization" of the AZPDES program should be replaced with the term "approval" of the program. We note that the term "authorization" is used in the first sentence of the Description of the Proposed Action section, the last sentence of Section III.B of that section, in the second sentence of Section IV.A of that section, and the second sentence of Section IV.B of that section.

12. In the second paragraph of the Consultation History section of the document we suggest replacing the phrase "species conservation required of Federal agencies under the ESA" (that appears in the sentence starting with "however") with the following phrase: "species conservation equivalent to that required of Federal agencies under section 7 of the ESA."

13. In the first sentence of the third paragraph of the Description of the Proposed Action section, we suggest that the phrase "any listed species or their critical habitat, including aquatic-dependent species and" prior to the word "upland."

14. We note that your cover letter dated November 27, 2002, enclosing the revised draft biological opinion, states that in EPA's Biological Evaluation, EPA concluded

that all listed species and critical habitat in Arizona are in, adjacent to, or dependent on surface waters in Arizona. The list of species attached to the Biological Evaluation were those that we determined to be in, adjacent to, or dependent on surface waters in Arizona.

Thank you for your consideration of these comments. Please contact me at your earliest convenience to discuss them prior to finalizing the biological opinion.

Sincerely,

/s/ Terry Oda
Terry Oda, Manager
CWA Standards and
Permits Office

[SEAL] **United States Department of the Interior** [LOGO]
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In Reply Refer to:

AESO/SE
2-21-03-F-0014

December 4, 2002

Terry Oda, Manager
CWA Standards & Permits Office
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105-3901

Dear Mr. Oda:

This biological opinion (BO) responds to the Environmental Protection Agency (EPA) request for consultation with the U.S. Fish and Wildlife Service (FWS) pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), as amended (ESA). Your request for formal consultation was dated October 17, 2002, and received by us on October 18, 2002. At issue are impacts that may result to the Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*) (PPC) from the proposed issuance of a National Pollution Discharge Elimination System (NPDES) permit to Asarco, Inc. for the Mission Complex located near Sahuarita, Pima County, Arizona. Your letter states that the State of Arizona has requested delegation to administer the

NPDES program and you have requested expedited consultation.

The EPA determined that this action will not affect the endangered cactus ferruginous pygmy-owl (CFPO) (*Glaucidium brasilianum cactorum*). We concur with EPA's finding based on the fact that Asarco has agreed to work outside the CFPO breeding season (February 1-July 31) to install their stormwater control facilities. Surveys for the CFPO were conducted in 2002, on TON lands, and no CFPO were detected. Surveys will be completed in 2003 for the stormwater control facilities on TON land before work is initiated. If a CFPO is detected in the 2003 surveys, depending on the location, all reasonable effort shall be made by EPA, Asarco, and TON to determine the breeding status, location, and extent of the territory. Construction maybe delayed until the applicants coordinate with FWS and we determine whether the taking of CFPO is not likely to result. If we are unable to make such a determination, EPA will reinitiate consultation on this action. The FWS shall work expeditiously with you, Asarco, and TON to resolve any issue that may arise from the detection and shall not unreasonably withhold authorization to proceed with the proposed action. We agree with Asarco that CFPO surveys are not needed on their private lands because of the insignificant amount of suitable habitat that is proposed for disturbance.

This BO is based on information provided in the September 23, 2002, draft biological assessment (BA), meetings, and other sources of information. Literature cited in this BO is not a complete bibliography of all literature available on the species of concern, general mining activities and its effects, the project area, or other

subjects considered in this opinion. A complete administrative record of this consultation is on file at the Arizona Ecological Services Field Office.

Consultation History

July 15, 2002: Staff from Asarco and FWS met to discuss issues related to the consultation.

October 4, 2002: FWS provided preliminary written review of draft BA to Asarco.

October 18, 2002: FWS received EPA's request for initiation of formal consultation.

October 31, 2002: Conference call with Asarco, EPA and FWS to discuss comments on the BA.

November 19, 2002: Asarco met with FWS to finalize conservation measures.

November 27, 2002: Asarco sent supplementary information and modification to the proposed action to EPA and FWS.

BIOLOGICAL OPINION

DESCRIPTION OF THE PROPOSED ACTION

The Mission mining operation is located approximately 20 miles southwest of Tucson, Arizona. The Proposed Action is located on the following Township and Range coordinates based on the Arizona Gila and Salt River Baseline and Meridian: T16S, R12E, Sections 13, 14, 23-25; T16S R13E, Sections 20, 21, 28-30; T17S, R12E, Sections 1-3, 10, 11, and T17S, R13E, Sections 3-10, and 15.

The BA (Gault Group, 2002) addresses two actions: the construction and maintenance of stormwater controls in compliance with the Asarco Mission Complex Stormwater Pollution Prevention Plan (SWPPP); and the ultimate footprint of mining operations on leased single allotments and district lands of the San Xavier District of the Tohono O'odham Nation (TON) as described in the Mine Plan of Operations (MPO) submitted to the Bureau of Land Management (BLM) in March of 2001. The NPDES permit for which EPA is seeking consultation would only cover the stormwater controls. The proposed action will also require a section 404 permit from the U.S. Army Corps of Engineers. The expansion of mining operations would be a future Federal action to be authorized by the BLM or the Bureau of Indian Affairs and is therefore not included within the scope of this consultation.

Asarco is proposing to construct and maintain stormwater run-on and run-off controls in a corridor around the existing mine operation footprint on both privately owned and leased TON lands in compliance with the SWPPP. Mission Mine is in the process of determining specific engineering designs, however, the total width of the disturbed area would not exceed 50 feet. The proposed action would be located at the toe of waste rock dumps and tailing impoundments that surround the main Mission open pit mine and the San Xavier North and South open pit mines.

The stormwater controls would consist of a combination of excavated soil channels, berms, impoundments, and reclamation in conjunction with each other to:

1. Minimize the amount of stormwater run-on to the Mission mine facilities;

2. Minimize overland flow of stormwater collected by run-on controls by placing outfalls at existing discrete conveyances (washes); and

3. Collect, route, and store stormwater run-off from mine facilities from a 100-year, 24-hour storm event on mine-owned or leased property.

Controls would include energy dissipation structures and riprap to minimize erosion of channels. Maintenance activities would include the resizing and armoring of existing stormwater controls for a 100-year, 24-hour storm event. Future maintenance of existing and proposed stormwater controls will also include the repair of erosion of reclaimed benches, berms, and channels, and removal of sediment from impoundments on a routine basis to preserve the 100-year, 24-hour capacity. The approximate total area of disturbance from the construction and maintenance of these stormwater controls is 165 acres; 60 acres on TON and 105 acres on private land. There are 17 PPC that will be affected by the proposed action; 13 occur on San Xavier-leased land and 4 occur on private land. Not all of the area proposed for disturbance will be lost, only 58.5 acres will be permanently removed as PPC habitat; 23.5 acres on TON and 35 acres on private land.

Proposed Conservation Measures

EPA, Asarco, and TON propose the following measures to minimize potential adverse effects to PPC and its habitat:

1. Stormwater controls will be designed in such as way as to avoid individual PPC and areas of PPC concentration insofar as practicable while complying with the SWPPP.

2. The release of channelized run-on stormwater at SWPPP-designated outfalls will be directed into existing ephemeral drainages rather than as sheetwash dispersed over the general area. No PPC or suitable PPC on the Mission complex, or adjoining areas beyond the footprint of the Mission complex, will be adversely affected by discharge of stormwater or invasion of exotic plants as a result of excess water, erosion, or deposition of excessive amounts of silt or other materials.

3. TON has jurisdiction over PPC on their lands and the disposition of the 13 PPC located on TON lands will be determined by TON, San Xavier natural resources staff, and Asarco before removal

4. The proposed action will result in the permanent removal of 58.5 acres of PPC habitat. Asarco is going to expand their existing 877-acre conservation easement by 58.5 acres to compensate for the loss of PPC habitat. The location of this area will be within the Mission complex, but not necessarily adjacent to the existing easement. The location will be coordinated with the FWS within one year of the date of this opinion.

5. The four PPC that are on private lands within the Mission complex will be transplanted to Asarco's PPC conservation easement

STATUS OF THE SPECIES

Pima Pineapple Cactus

Life History

The final rule listing Pima pineapple cactus as endangered was published September 23, 1993 (58 FR 49875). The rule became effective on October 25, 1993; critical habitat was not designated at that time. Factors that contributed to the listing include habitat loss and degradation, habitat modification and fragmentation, limited geographic distribution and plant species rareness, illegal collection, and difficulties in protecting areas large enough to maintain functioning populations. The biological information below is summarized from the proposed and final rules, and other sources.

Pima pineapple cactus is a low-growing hemispherical cactus with adults varying in stem diameter from 5.0 cm (2.0 inches) to 21.0 cm (8.3 inches) and height from 4.5 cm (1.8 inches) to 45.7 cm (18.0 inches). Individuals are considered adults when they reproduce sexually. Plants can be either single or multi-stemmed with yellow flowers blooming with the summer rains. Clusters of Pima pineapple cactus stems are formed primarily from vegetative clones produced at the plant base (Benson 1982, Roller 1996). The diagnostic field character of this taxon is the presence of one stout, straw-colored, hooked central spine. Radial spines extend laterally around the central spine and average 10 to 15 spines on large cacti and 6 on small cacti (Benson 1982).

Pima pineapple cactus occurs south of Tucson, in Pima and Santa Cruz counties, Arizona and adjacent northern Sonora, Mexico. It is distributed at very low densities

throughout both the Altar and Santa Cruz Valleys, and in low-lying areas connecting the two valleys.

Groups of flowers begin to bloom for single day periods following five to seven days after the first monsoon rains. Flowering is triggered by as little precipitation as 3 mm (0.12 inches).

Generally flowers begin opening midmorning and close at dusk (Roller 1996). Adult plants bloom one to three days each year; flowering is usually over by the end of August. Cross-pollination produces significantly more viable seeds than self-pollination. Fruits are mature within two weeks following successful pollination. Germination has been observed in the field during the summer monsoon rainy season (Roller 1996). Anecdotal observations indicate the species' flowers are visited by a variety of native bees and European honey bees, which have been observed to leave the flowers with their forehead and hind legs covered in Pima pineapple cactus pollen.

Habitat fragmentation and isolation maybe an important factor limiting future seed set of this cactus. Recent data show that the species cannot successfully self pollinate *in situ* and is reliant on invertebrate pollinators. One hypothesis is that the spatial distribution pattern of individual Pima pineapple cacti within a given area may regulate pollinator visitations, thus resulting in more successful cross-pollination and subsequent seed set over the population (Roller 1996). If the pollinators are small insects, with limited ability to fly over large distances, habitat fragmentation may contribute to a decrease in pollinator effectiveness with a subsequent decrease in seed set and recruitment.

Population Stability

Extrapolations from recent (1992-1997) surveys of known Pima pineapple cactus locations suggest that the cactus may be more numerous than previously thought. Projections based only on known individuals may underestimate the total number of individuals. This in no way indicates that the cactus is not rare or endangered. Pima pineapple cactus is widely dispersed in very small clusters across land areas well suited for residential, commercial, or mining development. Field observations suggest a great deal of land area within the range boundaries would not support Pima pineapple cactus today due to historical human impacts. Thus, populations are already considerably isolated from each other in many portions of the range, and population size and apparent recruitment varies significantly across the range. On a more local scale, population variability may relate to habitat development, modification, and/or other environmental factors such as slope, vegetation, pollinators, dispersal mechanisms, etc.

The transition zone between the two regions of vegetation described by Brown (1982) as semidesert grassland and Sonoran desert-scrub contains denser populations, better recruitment, and individuals exhibiting greater plant vigor. Vegetation within this transition zone is dominated by mid-sized mesquite trees, half shrubs (snakeweed, burroweed, and desert zinnia), and patches of native grass and scattered succulents. Because populations are healthier in this transition zone, conservation within these areas is very important (Roller and Halvorson 1997). However, this important habitat type is not uniformly distributed throughout the plant's range. Populations of Pima pineapple cacti are patchy, widely dispersed and

highly variable in density. The higher population densities have only been documented at three sites. Compared to other surveys, two of these sites are very small in scale and range from 6.3-7.5 plants per ha (1-3 plants per acre). Other densities across the majority of the plant's range vary between one plant per 1.9 ha (4.6 acres) and one plant per 8.5 ha (21 acres) (Mills 1991, Ecosphere 1992, Roller 1996).

Land areas surrounding developed parts of Green Valley and Sahuarita, Arizona, (including adjacent areas of the San Xavier District of the Tohono O'odham Nation) may be important for the conservation of this species within its range. Analysis of surveys conducted from 1992 to 1995 with a multivariate statistical analysis documented a pattern of greater population densities, higher ranks of cactus vigor, and reproduction occurring within the transition vegetation type found in this area of the northern Santa Cruz Valley (Roller and Halvorson 1997). This area could be defined as an ecotone boundary between semidesert grassland and Sonoran desert scrub.

Seedling and sub-adult size classes are uncommon in documented populations across the range. However, this may be a function of the difficulty of finding such small, well-camouflaged plants in a large-scale survey, or because the establishment phase of the seedling may be limited in some unknown way. Research on Pima pineapple cactus reproduction has suggested that the establishment phase of Pima pineapple cactus life history may limit recruitment within populations (Roller 1996). Evidence presented to support this conclusion was the abundance of flowers, fruits, and viable seed, and the rarity of seedling presence at different sites spread throughout the plant's range (Roller 1996). Other research has confirmed that the

establishment phase of other Sonoran cacti species may be critical for survival to reproductive maturity (Steenbergh and Lowe 1977).

Status and Distribution

Generally, the Pima pineapple cactus grows on gentle slopes of less than 10 percent and along the tops (upland areas) of alluvial bajadas nearest to the basins coming down from steep rocky slopes. The plant is found at elevations between 720 m (2,362 ft) and 1,440 m (4,593 ft) (Phillips et al. 1981, Benson 1982, Ecosphere 1992), in vegetation characterized as either or as combination of both the Arizona upland of the Sonoran desert scrub and semidesert grasslands (Brown 1982).

The acquisition of baseline information began with surveys documenting the presence of Pima Pineapple cactus as early as 1935. More intensive surveys were initiated in 1991 and other research established in 1993 further investigated the reproductive biology, distribution, fire effects, and mortality associated with various threats. Therefore, the best available baseline information is relatively recent and may not represent actual changes in distribution since the decline in the status of the species began.

Widely scattered surveys have been conducted across sites that varied considerably in cacti density. Densities ranged between 0.1-7.5 plants per ha (0.05-3 plants per acre). Pima pineapple cactus occurs in 50 townships within its U.S. range. However, a considerable amount of land area within the range boundaries does not provide habitat for the species due to elevation, topography, hydrology, plant community type, and human degradation. To date, an

estimated 22,959 ha (56,730 acres), (10 to 20 percent of the U.S. range) have been surveyed. Not all of this area has been intensively surveyed; some has only been partially surveyed using small land blocks to estimate densities rather than 100 percent ground surveys. A conservative estimate of total cacti located to date would be 3,800 individuals. The majority of those were located after 1991.

It is important to clarify that the above number represents the total number of locations ever found and not the current population size. It would be impossible to estimate densities over the remaining unsurveyed area because of the clumped and widely dispersed pattern of distribution of this species. Of the 3,800 individuals recorded to date, 2,203 (58 percent) of them have been removed throughout the range. This quantity includes observed and authorized mortalities and individuals transplanted since the species was listed in 1993 to present A small portion of these mortalities were caused by natural factors (i.e., drought). Moreover, this figure does not take into account those cacti that are removed from private land or lost to other projects that have not undergone section 7 review.

Transplanted individuals are not considered as functioning within the context of a self-sustaining population. Efforts to transplant individual cacti to other locations have only had limited success and the mortality rate has been high, especially after the first year. Furthermore, once individuals are transplanted from a site it is considered to be extirpated as those individuals functioning in that habitat are irretrievably lost. We view transplanting cacti as a measure of last resort for conserving the species. Transplanting will be recommended only when on-site and off-site habitat conservation is not possible and the death of cacti is unavoidable.

The area of habitat reviewed under section 7 between 1987 and 2000 (i.e., habitat developed or significantly modified beyond the point where restoration would be a likely alternative) is approximately 9,886 ha (24,429 acres) which represents 43 percent of the total area surveyed to date. In 1998, more than 445.5 ha (1,100 acres) of Pima pineapple cactus were lost including 143 ha (353 acres) from the Las Campanas Housing Development project, and 304.6 ha (752 acres) from the ASARCO, Inc. Mission complex project. In 2000, 237.3 ha (586 acres) of habitat were lost with the expansion of a state prison in Tucson. In 2001, 71.7 ha (177 acres) of habitat were lost through development, but 375.8 ha (888 acres) of occupied and suitable habitat were conserved through conservation easements. We are aware of housing developments along Valencia Road, Pima County, Arizona, in the vicinity of T15S, R12E, Section 15 and surrounding areas, that support Pima pineapple cactus. These developments affect several hundred acres of habitat and have not been evaluated through the section 7 process. The number of acres lost through private actions, not subject to Federal jurisdiction, is not known but given the rate of urban development in Pima County, we believe that it is significant.

Most of the documented habitat loss has occurred south of Tucson down through the Santa Cruz Valley to the town of Amado. This area is critical for the fixture recovery of the species. The expansion of urban centers, human population, and mining activities will continue to eliminate habitat and individuals, and result in habitat fragmentation.

The protection of habitat and individuals is complicated by the varying land ownership within the range of this

species. An estimated 10 percent of the potential habitat for Pima pineapple cactus is held in Federal ownership. The remaining 90 percent is on Tribal, State, and private lands. Most of the federally owned land is either at the edge of the species' range or in scattered parcels. The largest contiguous piece of federally owned land is the Buenos Aires National Wildlife Refuge, located at the southwestern edge of the species' range at higher elevations and lower plant densities.

Based on surveys and habitat analysis, areas south of Tucson through the Santa Cruz Valley to the town of Amado and surrounding developed parts of Green Valley and Sahuarita, and parts of the San Xavier District of the Tohono O'odham Nation, appear to support abundant populations, some recruitment, and units of extensive habitat still remain. However, the primary threat to the status of this species throughout its range is the accelerated rate. (i.e., since 1993) at which this prime habitat is being developed, fragmented, or modified.

Under section 9 of the Act, the taking of listed animals is specifically prohibited, regardless of landownership status. For listed plants, these prohibitions and the protection they afford do not apply. Listed plant species are protected only from deliberate removal from Federal lands. There is no protection against removal from, or destruction of, plants on any non-Federal lands under the Act by a land owner. The Arizona Native Plant Law may delay vegetation clearing on private property for the salvage of specific plants species within a 30-day period. Although the Arizona State Native Plant Law does prohibit the illegal taking of this species on state and private lands without a permit for educational or research purposes, it

does not provide for protection of plants *in situ* through restrictions on development activities.

Based on current knowledge, the following threats documented with this reduction in habitat alter the landscape in a manner that would be nearly irreversible in terms of supporting Pima pineapple cactus populations: urbanization, farm and crop development, and exotic species invasion. Prescribed fire can have a negative effect if not planned properly.

Other specific threats which have been previously documented (U.S. Fish and Wildlife Service 1993), such as overgrazing and mining, have not yet been analyzed to determine the extent of effects to this species. However, partial information does exist and can be applied. Mining has resulted in the loss of hundreds, if not thousands, of acres of potential habitat throughout the range of the species. Much of the mining activity has been occurring in the Green Valley area, which is the center of the species' distribution and the area known to support the highest densities of individuals. Overgrazing by livestock, illegal plant collection, and fire-related interactions involving exotic Lehmann lovegrass *(Eragrostis lehmanniana)* may also negatively affect Pima pineapple cactus populations (U.S. Fish and Wildlife Service 1993).

Even with complete data on historical change related to Pima pineapple cactus distribution and abundance, we cannot reliably predict population status due to compounding factors such as climate change, urbanization, legal, and political complexities (McPherson 1995). We do not know if the majority of populations of Pima pineapple cactus can be sustainable under current reduced and fragmented conditions. Thus, there is a need to gather

information on limits to the plant's distribution under current habitat conditions.

Based on monitoring results, the range-wide status of the Pima pineapple cactus appears to have been recently affected by threats that completely alter or considerably modify more than a third of the species' surveyed habitat, and have caused the elimination of nearly 60 percent of documented locations. These values are supplied to serve as an extrapolation of the situation which might be taking place across the rest of the entire population. Current information regarding the status of this species must be supplemented by more precise and thorough spatial analysis through the use of geographical information systems, databases, and on-the-ground surveys.

Dispersed, patchy clusters of individuals are becoming increasingly isolated as urban development, mining, and other commercial activities continue to detrimentally impact the habitat. The remaining habitat also is subject to degradation or modification from current land management practices, increased recreational use when adjacent to urban expansion (i.e., off-road vehicle use and illegal collection), and the continuing aggressive spread of nonnative grasses into habitat. Habitat fragmentation and degradation will likely continue into the foreseeable future based on historical data and growth projections produced by the Pima County Association of Governments (1996). There is very little Federal oversight on conservation measures that would protect or recover the majority of the potential habitat. Even some areas legally protected under the ESA have been modified and may not be able to support viable populations of the Pima pineapple cactus over the long-term.

ENVIRONMENTAL BASELINE

The environmental baseline includes past and present impacts of all Federal, State, or private actions in the action area, the anticipated impacts of all proposed Federal actions in the action area that have undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation process. The environmental baseline defines the current status of the species and its habitat in the action area to provide a platform from which to assess the effects of the action now under consultation.

Surveys for PPC were conducted from August 9 through September 10, 2002, by Sage Landscape Architecture and Environmental, Inc., Tucson, Arizona. Surveys were conducted within potentially suitable PPC habitat following the FWS-approved protocol. The width of the area of disturbance would not exceed 50 feet, however, a conservative, 150-foot wide corridor was surveyed around the perimeter of the Mission operation on both TON-leased lands and Mission fee lands.

The survey located 306 live PPC and 61 dead PPC within the survey area of 1,388 acres dictated by the maximum combined areas of stormwater controls and mine expansion (Sage Environmental 2002), representing a PPC density of 0.22 plants per acre that is within the normal range for the region (Mills 1991). The survey crew located 16 PPC that were either uprooted or trampled by cattle, and noted that some areas with high densities of PPC were impacted by heavy cattle grazing. Of all of the PPC located, 41% were in flower or had fruit, 45% had produced viable pups (offsets), and 27% had both pups and flowers or fruits. An unspecified number of plants were found in

bottomland areas and along stream channels, usually considered unsuitable habitat for PPC, and suggesting a tolerance for disturbance (Sage 2002).

PPC have recolonized areas within the Mission complex that had been disturbed. During surveys conducted by Dames and Moore (1997) PPC were located in the bottoms of two stormwater detention basins, constructed in 1969. Sage (2002) also found PPC within roadways, on top of a stormwater control dike, and along stream channels. This indicates that not all areas that are disturbed become unsuitable for PPC. Based on these observations, Asarco estimates that only 58.5 acres (35%) of the 165 acres to be disturbed will be permanently removed as PPC habitat.

A previous biological opinion was issued for impacts to PPC on July 27, 1998, (2-21-97-F-328) for the construction and operation of tailing impoundment No. 4 at Mission. Construction of the impoundment directly affected 309 individual PPC. Conservation measures associated with the action resulted in the establishment of an 877-acre conservation easement. This site was used for transplantation of affected PPC. Survival rates are unknown.

EFFECTS OF THE ACTION

Effects of the action refer to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated and interdependent with that action, that will be added to the environmental baseline. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are

those that have no independent utility apart from the action under consideration. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur.

The proposed stormwater run-on and run-off controls construction and maintenance would disturb a maximum of 165 acres of potential PPC habitat. Of that, 58.5 acres will be permanently removed. The remaining acres, although disturbed during construction, will be available for PPC recolonization after construction. Although stormwater controls would not exceed 50 feet in width from the perimeter of the Mission operations, the BA assumed that any PPC within 100 feet of the facility perimeter would be affected. Accordingly, the proposed action would result in the permanent loss of 58.5 acres of habitat and the removal of up to 17 PPC. Density of cactus is calculated to be 0.10 cactus/acre. This is well within the average for the species. Densities of approximately 0.40 cacti/acre are fairly common. This would indicate that the habitat is suitable for PPC.

To compensate for the permanent loss of PPC habitat, Asarco has agreed to add 58.5 additional acres to its existing 877-acre conservation easement. In addition, PPC on Mission fee lands that will be affected by the proposed action will be transplanted to the conservation easement. Although transplant success of PPC is low, there may be a few plants that survive. Setting aside additional acreage of occupied PPC habitat, with a similar density (0.10 cactus/acre), will result in additional conservation benefits for the species. A 1:1 ratio for replacement is adequate as the average density for cactus associated with the proposed action is below the average. PPC will not be able to survive in the long-term in small, fragmented areas

surrounded by urban development. Large, contiguous blocks of habitat need to be managed for their natural values. All of the proposed conservation actions included in the biological assessment and supplement are critical to offset impacts to PPC and its habitat.

CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, tribal, local, or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

Cumulative impacts from private actions include potential future mining operations at Mission and Phelps Dodge Sierrita mines, future development activities at the Caterpillar Proving Grounds, urban development in areas around south Tucson, Green Valley, Nogales, Rio Rico, and along the Santa Cruz River. Much of this development will have little or no Federal nexus. Without any protection under the Act, the only protection available is through the Arizona Native Plant Law, which provides only for salvage for scientific and educational purposes. Regardless of salvaged PPC transplant success, the habitat would be lost.

CONCLUSION

After reviewing the current status of the PPC, the environmental baseline for the action area, the effects of the proposed action, and cumulative effects, it is the FWS's

biological opinion that the issuance of the NPDES permit for the Mission Complex, as proposed, is not likely to jeopardize the continued existence of the PPC. No critical habitat has been designated for this species, therefore, none will be affected.

The conclusions of this biological opinion are based on full implementation of the project as described in the *Description of the Proposed Action* section of this document, including any conservation measures that were incorporated into the project design.

INCIDENTAL TAKE STATEMENT

Sections 7(b)(4) and 7(o)(2) of the ESA do not apply to listed plant species. However, protection of listed plants is provided to the extent that the ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. Neither incidental take nor recovery permits are needed from FWS for implementation of the proposed action.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the BSA directs Federal agencies to utilize their authorities to further purposes of the ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on

listed species or critical habitat, to help implement recovery plans, or to develop information.

1) We recommend that EPA work with Asarco and FWS to expand the size of the PPC conservation area at the Mission complex.

2) We recommend that EPA work with Asarco and FWS to transplant affected PPC to the newly expanded segments of the conservation area.

3) We recommend that EPA participate on the stakeholder participation team developing the Pima pineapple cactus recovery plan and consider contributing to on-going survey efforts in Pima and Santa Cruz counties to determine the status of PPC on State lands.

4) We recommend that EPA, in cooperation with FWS, develop long-term conservation strategies for PPC and incorporate those strategies into the NPDES program.

In order that we be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, we request notification of the implementation of any conservation recommendations.

REINITIATION NOTICE

This concludes formal consultation on the proposed action. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not

considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

We appreciate the EPA's efforts to identify and minimize effects to listed species from this project. For further information please contact Mima Falk at (520) 670-4550, or Mike Martinez at (602) 242-0210 (x224). Please refer to consultation number 2-21-03-F-0014 in future correspondence concerning this project.

Sincerely,

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

OFFICE OF THE
REGIONAL ADMINISTRATOR

December 5, 2002

Jane Dee Hull
Governor
State of Arizona
1700 West Washington
Phoenix, AZ 85007

Dear Governor Hull:

I am pleased to inform you that the U.S. Environmental Protection Agency has approved the State of Arizona's application to administer the National Pollutant Discharge Elimination System program pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). Specifically, Arizona is being approved to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State except for Indian Country.

Let me congratulate you and everyone at the State on this fine effort. We look forward to continue working

closely with you on the NPDES program. If we can assist you in any way, please feel free to call.

Sincerely,

/s/ Wayne Nastri
Wayne Nastri
Regional Administrator

NOTICE OF PROPOSED ACTION
by the

U. S. Environmental Protection Agency
Region 9, WTR-5
75 Hawthorne Street
San Francisco, CA 94105

ON APPLICATION FOR APPROVAL OF THE ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

SUMMARY: The State of Arizona, by letter dated June 5, 2002, submitted a request to EPA for approval of the Arizona Pollutant Discharge Elimination System (AZPDES) Program, pursuant to Section 402 of the Clean Water Act. On July 11, 2002, EPA sent to the State its determination that the submission is complete. Under the Clean Water Act, EPA has 90 days from June 11 (i.e., the day EPA received the complete submission) to decide, whether to approve or disapprove the State's request for approval. If EPA approves the AZPDES program, the State would administer this program, which regulates the discharges of point sources to navigable waters, in place of the National Pollutant Discharge Elimination System (NPDES) program now administered by EPA in Arizona. The State is not seeking approval to regulate the disposal of sewage sludge (in accordance with section 405 of the Act and 40 CFR part 503). EPA will retain NPDES permitting authority and primary enforcement responsibility over the sewage sludge program. Arizona is planning to apply for this authority in the future. In addition, the State is not seeking approval to administer the NPDES program in Indian Country. EPA will remain responsible for implementing and enforcing the NPDES program in Indian Country.

EPA is requesting comments on the State's request and providing notice of a public hearing. EPA will either approve or disapprove the State's request after considering all comments it receives. EPA has also initiated consultations under the Endangered Species Act and National Historic Preservation Act.

PUBLIC COMMENT PERIOD: The public comment period on the State's request for approval to administer the proposed AZPDES program is currently open and will end September 16, 2002. Public comments may be in either paper or electronic format. Comments must be received or post-marked by no later than midnight on September 16, 2002. Send all paper copy comments to: Mr. Matthew Mitchell (WTR-5), Water Division, EPA Region 9, 75 Hawthorne Street, San Francisco, CA, 94105. Comments may also be submitted electronically to the following e-mail address: mitchell.matthew@epa.gov.

EPA requests that electronic comments include the commentor's [sic] postal mailing address. No Confidential Business Information (CBI) should be submitted through e-mail. Comments and data will also be accepted on disks in WordPerfect 8.0 format or ASCII file format.

If submitting comments in paper format, please submit the original and three copies of your comments and enclosures (including references). To ensure that EPA can read, understand and therefore properly respond to comments, the Agency would prefer that comments be typed or

* * *

Response To Comments Received on State of Arizona's Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program

December 5, 2002

I. Category : Public Participation in State Enforcement Process

Comment 1; Arizona Center for Law in the Public Interest

The AZPDES Appeals Process Is Not Consistent With Federal Requirements.

EPA may only approve a state's NPDES permit program that is consistent with and not less-stringent than the federal NPDES permit program. 40 C.F.R. § 123.1. Although states are free to enact provisions that are more stringent than the federal requirements, the states must meet the minimum federal requirements. Federal law requires that states administering NPDES programs shall provide for public participation in the state enforcement process by providing either of the following:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest **which is or may be adversely affected**; or
(2) Assurance that the state agency or enforcement authority will:
(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26 (b)(4);
(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action.

40 C.F.R. § 123.27 (d) (emphasis added). Furthermore, the judicial review available under a state's NPDES program must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30. There can be no serious dispute that the language in 49-323 (A) fails to comply with federal law.

A.R.S. § 49-323 (A) provides, in pertinent part, that an appeal may be taken "by any person who is adversely affected by the action or by any person who may with reasonable probability be adversely affected by the action and who has exercised any right to comment on the action . . . " This provision is far more restrictive than the federal standard and clearly violates the requirements of 40 C.F.R. § 123.30. This "procedure" will have a chilling effect on public participation in all aspects of the permitting process but especially the judicial review because it severely limits the right to judicial review of a permitting decision. Again, the Arizona Center for Law in the Public Interest and the Sierra Club, among others, have been raising this issue for over a year. We raised it with the Arizona Legislature, the Governor, and the Arizona Department of Environmental Quality. At this point it is evident that unless the State of Arizona is ordered to make the necessary changes by either EPA or a

court, the State will maintain the status quo of denying citizens their federally established right to judicial review of permit decisions.

Response: The regulations that set forth the State program requirements for the NPDES program contain provisions that address public participation in both state enforcement and permitting processes. These provisions set forth different requirements and standards for each of these processes. The commenter appears to be commenting on the adequacy of the State of Arizona's provisions related to public participation for both the enforcement and permitting processes.

First, in response to the comment related to public participation in enforcement actions, EPA disagrees that the State of Arizona fails to meet the standard set forth in the regulations. The regulations require that a state seeking NPDES authority provide for public participation in the state enforcement process by providing either "intervention as of right in any civil or administrative action to obtain remedies specified in [40 C.F.R. § 123.27(a)(1), (2), or (3)] by any citizen having an interest which is or may be adversely affected; or" provide assurance that it will meet an alternate test of public participation. As explained in detail below, EPA believes that Arizona meets the public participation requirement by providing intervention as of right in civil actions to obtain the remedies specified in 40 C.F.R. § 123.27(a)(1), (2) and (3).

As the commenter notes, 40 C.F.R. § 123.27(a) requires a state seeking authority to administer the NPDES program to have certain enforcement authorities. Specifically, it requires that the State have authority to: (1) restrain

immediately and effectively any person by order or by suit from engaging in activity which is endangering or causing damage to public health or the environment; (2) sue to enjoin any threatened or continuing violation of NPDES requirements; and (3) to assess civil and criminal penalties for violations of NPDES requirements. The State of Arizona meets the requirements of 40 C.F.R. § 123.27(a)(1), (2), and (3) by having the authority to file a civil action to: (1) immediately and effectively restrain a person[1]; (2) enjoin any threatened or continuing violation of any NPDES program requirement; and (3) recover civil and criminal penalties.[2]

Public participation in all of the civil actions described above, is governed by Rule 24 of the Arizona Rules of Civil Procedure. Specifically, Rule 24 (a)(2) of the Arizona Rules of Civil Procedure allows intervention as of right upon timely application "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.*" (Emphasis added). This provision is identical to Rule 24 (a)(2) of the Federal Rules of Civil Procedure.

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[1] While the State has authority to issue an administrative compliance order, it can be appealed and does not become final until after a decision on the appeal. Accordingly, ADEQ must file a judicial action to "immediately and effectively" restrain a person from engaging in activity which is endangering or causing damage to public health or the environment.

[2] The State does not have administrative authority to assess civil or criminal penalties.

In its "NPDES State Program Guidance," July 1986, EPA notes that in addition to the two options set forth in 40 C.F.R. § 123.27(d), there is a third option available to States. Specifically, EPA provides "a State may allow intervention through a rule analogous to Rule 24(a)(2) of the Federal Rules of Civil Procedure and provide an assurance by the appropriate State enforcement authority that it will not oppose intervention under the State analogue on the ground that the applicant's interest is adequately represented by the State." For purposes of AZPDES enforcement, ADEQ is the principal enforcement authority, and it recently provided an assurance "that it will not oppose intervention under the State analogue on the ground that the applicant's interest is adequately represented by the State" in an addendum to the Memorandum of Agreement (MOA) with EPA Region 9.[3]

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[3] According to the Attorney General, State law provides the Director with enforcement discretion, *e.g.*, "the director, through the attorney general, *may* request a temporary restraining order, a preliminary injunction, a permanent injunction or any *other relief necessary* to protect the public health. . . . " A.R.S. §49-262 (A) (emphasis added); "the attorney general may, and at the request of the director shall, commence an action in superior court to recover civil penalties [for violations of, *inter alia,* AZPDES rules or permits]. A.R.S. §49-262 (C). Further, as explained in the Attorney General's Statement, the Arizona Supreme Court has stated that the exercise of a discretionary power "is wholly within the function of the administrative body except that it may not abuse its discretion." *Arizona State Highway Commission v. Superior Court of Maricopa County,* 81 Ariz. 74, 299 P.2d 783, 785 (Ariz. 1956) (citation omitted). Thus, according to the Attorney General, ADEQ is authorized to exercise its enforcement discretion by agreeing not to oppose intervention under Civil Procedure Rule 24 (a)(2) on the ground that an applicant's interest in an AZPDES enforcement action is adequately represented by the State. The Attorney General's Statement also states that the same principle would apply in the event the Attorney General undertook an independent

(Continued on following page)

Therefore, EPA believes that the State of Arizona meets the requirements of 40 C.F.R. § 123.27(d).

Second, EPA disagrees with the commenter that the State of Arizona fails to meet the regulations that address public participation in the State permitting process. As the commenter notes, the regulations that address judicial review of approval or denial of permits available under a state's NPDES program requires that the state procedures must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30.

The standard that applies to judicial review in federal court of a federally-issued permit is set forth in Section 509(b)(1) of the CWA which provides in pertinent part:

> Review of the Administrator's action . . . (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. . . .

As explained in the Attorney General's Statement, Arizona law provides an opportunity for judicial review in state

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action not requested by the Director to seek civil penalties under A.R.S. §49-262 (C) or injunctive relief under § 49-262 (B).

court of the final approval or denial of permits by: (1) the permittee or permit applicant; (2) any person who was a party to the administrative appeal of the final permit action; and (3) person who can demonstrate an interest that qualifies the person to intervene in the action. Further, the Attorney General explains in her statement that "any interested person may intervene in the administrative appeal as a matter of right, in addition to the right of appeal granted to any person who is or may with reasonable probability be adversely affected by the permit action." Finally, parties to a proceeding before an administrative agency may seek judicial review by filing a complaint within 35 days after being served with a copy of the administrative decision. Therefore, EPA believes that the State of Arizona meets the requirements of 40 C.F.R. § 123.30, which sets forth the standards for "Judicial review of approval or denial of permits."

II. Category: Funding of the AZPDES Program

Comment 1; Arizona Center for Law in the Public Interest

The State Of Arizona Cannot Adequately Fund The AZPDES Program. Pursuant to the Clean Water Act, the state seeking delegation must have adequate authority to administer the NPDES program. 33 U.S.C. § 1342(b). In the present case, Arizona lacks the authority because the program has no funding mechanism whatsoever. It is our understanding that EPA is providing the majority of the funding for the AZPDES program. Without EPA funding, it is apparent that the State would be unable to support the AZPDES program thereby forcing EPA to withdraw delegation. In addition to the State's ongoing budget crisis, the State has assured that the AZPDES program would not be self-supporting by prohibiting itself from instituting

any type of permit fee. A.R.S. § 49-255.01 (J) states that " . . . The Department shall not charge a fee to issue, deny, modify, suspend or revoke a permit under this Article or to process permit applications." Permit fees are a widely-used for obtaining additional funding for such programs air both state and federal levels. See e.g., Cal. Water Code § 13260 (establishing annual fees). It is our understanding that the State made the decision to not implement permit fees in order to gain support for the primacy process from the regulated community. However, this compromise will likely cost Arizona the NPDES program because after EPA funds are terminated, Arizona will most likely be unable to fund the program as it is currently defined.

Response: According to the AZPDES Program Description (page 5), federal funding makes up approximately 40% and state funding makes up 60% of the AZPDES program funding. EPA believes that the Arizona Legislature has indicated a commitment to fund the AZPDES program through its funding of nine positions for the AZPDES program for FY2002 and FY2003 before the program was authorized. In addition, during recent budget negotiations, the Arizona Governor ensured that the funding for these AZPDES positions stayed intact. Any government program, state or federal, is subject to the uncertainties of the budget process in the future. EPA believes that the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

III. Category: Laboratory Analytical Capabilities

Comment : Navajo Nation

Program Description, Page 2, *III. Organization and Structure:* There is a lack of discussion concerning the

laboratory analytical capability to be utilized by the AZPDES Program for compliance and enforcement purposes. It is well understood that the State of Arizona operates an excellent analytical laboratory that will likely be utilized by the AZPDES Program.

Response: ADEQ has verified that when ADEQ staff take effluent samples, ADEQ staff will send the samples to the Arizona Department of Health Services (ADHS) laboratory for analysis unless the laboratory does not have the equipment or capability to perform the necessary analysis. In that case, ADEQ will utilize an ADHS certified contract laboratory.

IV. Category: Preservation of Historic Properties

Comment I: Inter-Tribal Council of Arizona

While the State does not authorize or administer the NPDES program in Indian Country, the regulation of discharges could pose the potential threat to lands and historic sites in Indian Country. In addition, the proposed MOA [Memorandum of Agreement] between the State of Arizona and EPA does not deal effectively with possible adverse impacts to historic properties that are located outside of Indian reservation lands. These include archeological sites, burial grounds, traditional cultural properties and other sites considered to have national importance to the Tribes that are now afforded some consideration for protection under the NHPA. The NHPA provides that the American Indian tribal governments shall be consulted on projects or undertakings that may impact properties listed on or eligible for inclusion on the National Registry for Historic Places that are located on any lands within the State of Arizona.

Response: EPA believes that historic properties, including tribal historic resources located both in and out of Indian Country within the State of Arizona, will be protected under the AZPDES program. Under State law, ADEQ is required to provide notice of all proposed AZPDES permits to a number of parties, including affected tribes and the State Historic Preservation Officer (SHPO). This notification will provide parties with an opportunity to comment on proposed permits. In addition, under a separate Memorandum of Understanding (MOU), ADEQ and the SHPO's Office have agreed to procedures that, among other things, further specify the coordination they will undertake should the SHPO believe that a proposed permitting action may have an adverse effect on historic properties. The MOU also commits ADEQ to ensure that permits comply with applicable laws to provide the maximum protection of historic properties and to seek ways to avoid, minimize or mitigate any adverse effects to such properties. Further, their MOU provides that if the two agencies are unable to resolve the issues identified by the SHPO, the SHPO will notify EPA for appropriate consideration under EPA's Clean Water Act oversight of the program. Therefore, under the AZPDES program, potential effects of ADEQ permitting actions on historic properties will be considered and addressed as part of the permitting process.

Additionally, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including issues related to permits that may have a potential adverse effect on tribal historic properties. Finally, as recognized in the MOA between EPA and ADEQ, EPA retains the authority under the CWA to object

to AZPDES permits that do not meet applicable CWA requirements, and if the objections are not resolved, to issue the permits itself. Accordingly, should a proposed AZPDES permit having a potential adverse effect on tribal resources result in a violation of applicable CWA requirements, EPA will have the authority, consistent with the CWA, to object to its issuance.

Comment 2; Inter-Tribal Council of Arizona

The present language of the MOA between EPA and ADEQ is not in accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175, and 512 DM 2. The following language is suggested: "Meaningful consultation with the Tribes shall be adhered to by ADEQ on requested permits and permit modifications for projects, programs, and activities on Federal and State lands carried out under the auspices of this MOA that have a potential adverse effect on tribal historic properties."

The identification and evaluation of historic properties, assessment of effects and consultation procedures are outlined under rules and regulations promulgated for section 106 of the National Historic Preservation Act (16 U.S.C. § 470f). It should be noted that the permitting process in itself triggers a Section 106 review process with the requirement for tribal consultation.

Response: EPA will continue to consult with Tribes, consistent with the federal trust responsibility, on matters that arise under the AZPDES program which may affect Tribes, including permit issues that may have a potential adverse effect on tribal historic properties, whether or not

located in Indian Country. Therefore, EPA believes that an amendment to the MOA between EPA and ADEQ is not necessary.

Comment 3; Inter-Tribal Council of Arizona

In addition to consultation requirements, ITCA requests that the MOA between EPA and ADEQ be amended to include the following language, "The potential effects of a permitted project on federally recognized Indian tribes and their historic properties and culturally important sites located outside of Indian reservation lands be evaluated and determined such that there are no detrimental effects to traditional cultural places, waters, or historic sites before a NPDES permit is issued."

Response: For the reasons set forth in response to Comment 1 in Category IV above, EPA believes that an amendment to the MOA between EPA and ADEQ is not necessary.

Comment 4; Inter-Tribal Council of Arizona

The current draft MOA adequately addresses the responsibility of EPA to implement and enforce the NPDES program within present day American Indian reservation boundaries. But it should include provisions whereby EPA consults with Indian tribes to insure that no adverse effects to tribal lands and to culturally important sites outside of Indian reservation lands occur if or when any NPDES permit be issued by either EPA or ADEQ.

Response: As explained in response to Comment 1 in Category IV above, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on

matters that may affect Tribes after approval of the AZPDES program. Such consultation may address matters that may impact lands and culturally important sites both within the boundaries of Indian country and outside such boundaries. Therefore, EPA believes that an amendment to the MOA is not necessary.

Comment 5; Bruce Nigel

Analysis of the authorization request indicates that zero protection of historic properties will be granted by the state should that government issue its own permits. Currently, under the NPDES program an authorization to discharge under a NPDES permit requires that historic properties not be adversely impacted by the activities authorized by the permit. According to federal law, a Clean Water Act permit may not be issued if the resultant (sic) of the permit will be the destruction of historic property. In Arizona, without such protection, developers will be encouraged to grade their property without thought of protecting or cataloging irreplaceable historic artifacts. The "encouragement" is manifest by the fact that without historic property protection, developers will experience cost savings by not expending any money on preserving those artifacts.

Response: EPA disagrees with this comment. As explained above in response to Comment 1 in Category IV above, EPA believes that historic properties, including tribal historic and cultural resources located both in and out of Indian Country within the State of Arizona, will be provided protection under the AZPDES program. In addition, EPA believes this comment misstates the effect of federal law. Where applicable, federal law, such as the

NHPA, generally imposes only procedures to evaluate potential impacts of and possible alternatives for proposed permits which may adversely impact historic resources. As described in detail above, EPA believes that procedural safeguards remain under the AZPDES program. Accordingly, EPA disagrees that developers will be encouraged to destroy historic and cultural resources under the AZPDES program.

Comment 6; Bruce Nigel

The Arizona delegation proposal does not make even the smallest token attempt at allowing the native American communities any input into the issuance of NPDES authorizations. Under Arizona's proposal, a permitted activity adjacent to native American tribal lands could cause the ruin of valuable artifacts on the land before the tribal government was even aware the activity was authorized. The program proposed by the state will allow thousands of authorizations without any public notice of the development. On the vast majority of developable lands the historical significance is yet to be determined. Therefore, in the best interest of Environmental Justice and preserving the archeological and cultural history of the citizens of Arizona, the delegation for authorization should be rejected.

Response: EPA believes that Tribes will continue to play an important role in ensuring that historic and cultural resources are protected under the AZPDES program. Specifically, the AZPDES regulations require ADEQ to provide notice of a proposed permit to a number of persons, including affected tribes and the SHPO's Office. This notification, among other things, will provide parties

with an opportunity to comment on proposed permits. Therefore, Tribes will have an opportunity to provide input to ADEQ on potential adverse effects on tribal cultural and historical resources. In addition, as set forth in Response to Category IV Comment 1 above, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including issues relating to permits that may have a potential adverse effect on tribal historic properties. Therefore, Tribes also may raise concerns related to proposed AZPDES permits as part of the government-to-government consultation process. Accordingly, EPA believes that Tribes will continue to have opportunities for input on proposed permits administered under the AZPDES program.

In addition, the CWA requires EPA to approve submissions from States seeking approval to administer the NPDES program, unless EPA determines that the submission fails to meet the statutory criteria set forth in Section 402(b). Accordingly, EPA does not have the authority to deny a State's application to administer the NPDES program based only on a finding that it would be "in the best interest of Environmental Justice and preserving the archeological and cultural history of the citizens of Arizona."

Comment 7; The Navajo Nation

The public notice for the AZPDES program submission that appeared in the Federal Register (August 1, 2002, Volume 67, Number 148, Page 49916-49920) states that "EPA will not make a final decision on AZPDES program approval until after: . . . (2) completion of the ongoing

consultations with the U.S. Fish and Wildlife Service on effects program approval may have on endangered or threatened species and their designated critical habitat; and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places." No documents comprising the AZPDES program submission discuss the AZPDES permit review procedures involving potential effects on endangered or threatened species and their designated critical habitats and historic properties or sites.

In the Navajo Nation's development of its own NPDES program submission, Navajo EPA participated in extensive work (meetings, correspondences, teleconferences, etc.) starting in 1995 with the U.S. Fish and Wildlife Service, the New Mexico State Historic Preservation Officer (SHPO), and the Advisory Council for Historic Preservation (ACHP). Navajo EPA subsequently reached closure with ACHP concerning NPDES permit actions and historic properties and sites. For NPDES permit actions and endangered or threatened species and their designated critical habitats, EPA opted to progress toward the use of its proposed "national MOA" with the U.S. Fish and Wildlife Service. The intent was to have the "NPDES MOA Between the Navajo Nation and the U.S. Environmental Protection Agency Region 9" spell out how Navajo EPA see to it that NPDES permit actions have no effect on endangered or threatened species and their designated critical habitat and on the preservation of historic properties. EPA's public notice of the AZPDES program submission without consultations completed with the U.S. Fish and Wildlife Service and the SHPO or

without any ESA and NHPA discussion in permitting procedures gives the impression that EPA is utilizing a different (abbreviated) NPDES program approval format for the State of Arizona.

Response: Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), the Agency consults with the appropriate SHPO and/or Tribal Historic Preservation Officer on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. Accordingly, on July 25, 2002, EPA initiated discussions with the State of Arizona's SHPO on the State's application to administer the NPDES program. Among other things, EPA and the SHPO discussed the issue of coordinating with Tribes on the AZPDES application. Following on this discussion, on August 9th, 2002, EPA sent a letter to each of the 23 Tribal Governments located within the State. EPA sent this letter to ensure each Tribe had notice of, and an opportunity to provide input on, Arizona's application, and to outline the AZPDES application and the process EPA would follow to review the application.

On August 23, 2002, EPA provided the Arizona SHPO's Office with EPA's determination that approval of Arizona's application would have no effect on historic properties in Arizona. As part of the coordination process, the SHPO's Office raised certain issues regarding approval of the Arizona program for further discussions. By letter dated

September 23, 2002, the SHPO withdrew these issues for consideration and informed EPA that it was working with ADEQ to coordinate its activities in the protection of Arizona's cultural resources. On October 18, 2002, the SHPO and ADEQ entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive notices of certain proposed permit actions. This MOU further provides for coordination between ADEQ and the SHPO to resolve any identified issues to ensure that AZPDES permits will comply with Arizona water quality standards and Arizona laws protecting historic properties. For those permits with the potential to adversely affect historic properties, ADEQ and the SHPO agreed to seek ways to avoid, minimize or mitigate any adverse effects to historic properties stemming from the proposed permit. EPA believes that the agreement between ADEQ and the SHPO is consistent with EPA's determination that approval of the State permitting program would have no effect on historic properties.

See also response to Comment 12 in Category XII below for EPA's response to comment pertaining to Endangered Species.

Comment 8; Arizona Chamber of Commerce

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be

required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process.

EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

Comment 9; Home Builders Association of Central Arizona

Identical to Comment 8.

Comment 10; Withey, Anderson & Morris

Identical to Comment 8.

Comment 11; Diamond Ventures Inc.

The protection of historic properties is not a significant concern of the approval of the AZPDES program in that, like the Endangered Species Act, ADEQ is not required to consult with the State Historic Preservation Office (SHPO) (in accordance with Section 106 of the National Historic Preservation Act.) In the same manner as stated above, the AZPDES program is designed consistent with the programs in place with the vast majority of states relative to the National Historic Preservation Act.

Response to Comments 8, 9, 10, and 11: Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. As discussed above in response to Comment 7 in Category IV above, EPA coordinated with the Arizona SHPO regarding EPA's potential approval of the AZPDES program. In addition, EPA agrees with the commenters that historic properties will be provided protections under the AZPDES program. Specifically, as explained above, under both State law and a MOU between ADEQ and SHPO's Office, procedures are laid out to ensure that permits comply with applicable laws to provide the maximum protection of historic properties and that ADEQ will seek ways to avoid, minimize or mitigate any adverse effects to such properties. Finally, consistent with the federal trust responsibility, EPA will continue to consult

with Tribes on matters that arise under the AZPDES program which may affect Tribes, including permit issues that may have a potential adverse effect on tribal historic properties.

V. Category: International Wastewater Treatment Plant

Comment 1; Arizona Center for Law in the Public Interest

International Wastewater Treatment Plants Must Remain Under EPA's Authority. EPA should retain authority for regulating all NPDES permits for international wastewater treatment plants, and specifically, the Nogales International Wastewater Treatment Plant. EPA is an important part of the process towards repairing the Nogales Plant and it is imperative that EPA remain the regulator of that facility.

Response: EPA believes that the provisions for retaining authority for permits that are subject to EPA enforcement action or under appeal in Sections III.C.2. and C.3 of the Memorandum of Agreement between EPA Region 9 and ADEQ are appropriate. The permit for the Nogales International Wastewater Treatment Plant (NIWTP) was issued in 2001 and is not under appeal and the facility is not subject to a current EPA enforcement action. EPA has worked with ADEQ's Border Office and Water Permits Section staff on the NIWTP permit, thus ADEQ staff is familiar with the permitting circumstances. EPA does not believe it is appropriate to retain authority over this permittee and will rely on its oversight role.

VI. Category: Deferral of Sewage Sludge Authorization

Comment; Pima County Wastewater Management

Pima County Wastewater Management (PCWWM) holds NPDES permits for discharges from its wastewater treatment plants which contain permit provisions regulating the disposal of sewage sludge. PCWWM requests that EPA in a response to comments explain how these types of already issued permits, which contain regulatory program elements that may be delegated as well as program elements that will not be delegated, will be jointly administered by EPA and ADEQ. PCWWM specifically requests that EPA explain how these permits will be administered in relation to drafting permit changes, providing public notice, issuing, authorizing, denying, reissuing, suspending, revoking, receiving reports, enforcement, and performing facility inspections. PCWWM also asks that EPA clarify the process that must be used to make application for obtaining a new permit where both delegated and non delegated program elements must be included within an application.

Response: EPA is approving ADEQ's program to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State, except for in Indian country. However, as the commenter states, EPA will continue to administer the sewage sludge regulatory program in Arizona, in accordance with 40 C.F.R. part 503. EPA will oversee the program through review of draft and/or proposed permits for all major facilities including the sewage sludge management portions in addition to taking enforcement actions for violations of 40 C.F.R. part 503. Furthermore, EPA will administer and enforce those

portions components of the federal sludge management program that are "self-implementing," i.e., which are directly applicable to entities not subject to NPDES permits, such as sludge haulers, land applicators, etc. ADEQ does yet not have EPA approval for its own sludge management program that would allow it to administer and enforce these components under the CWA.

Nevertheless, ADEQ will have certain responsibilities for sewage sludge use and disposal requirements imposed and implemented through NPDES permits. In order for EPA to approve Arizona's NPDES program, the State was required to have authority to impose standards for sewage sludge use and disposal in NPDES permits that are equivalent to federal standards adopted pursuant to Section 405 (d) of the CWA. (40 C.F.R. § 122.44(b)(2).) Arizona has demonstrated that it has such authority, which it will fully exercise in issuing AZPDES permits. This includes the authority to draft permit changes, provide public notice, issue, authorize, deny, reissue, suspend, revoke, receive reports, enforce, and inspect based on that authority. Thus, permittees that have either an NPDES or AZPDES permit with sewage sludge conditions should submit applications for permit renewal to ADEQ.

Because of the federal and state laws, preparers are required to submit annual reports to EPA and ADEQ.

ADEQ has informed EPA that it has revised and sent its formal application for approval of its sludge management program. The period of time during which EPA retains regulatory authority for the sewage sludge management program while ADEQ implements biosolids requirements in permits may thus be only a matter of a few months.

VII. Category: Continuing Planning Process

Comment: Navajo Nation

Program Description, Page 2, 7th paragraph, *III. Organization and Structure:* According to 40 C.F.R. § 123.25(b), "State NPDES programs shall have an approved continuing planning process under 40 C.F.R. § 130.5 and shall assure that the approved planning process is at all times consistent with the CWA." The program description in the AZPDES program submission refers to a " . . . continuing planning process submission of 1993 or more recent additions sent to EPA." Has the 1993 or any recent addition of Arizona's continuing planning process been received and approved by EPA for consistency with the CWA? The Navajo Nation submitted its initial continuing planning process in 1996 but has since made required changes to its process document.

Response: EPA approved Arizona's Continuing Planning Process (CPP) submitted in 1993.

VIII. Category: Jurisdiction for Private Lands within Boundaries of Navajo Reservation

Comment: Navajo Nation

Program Description, Page 1, 2nd paragraph, *II. Scope of the Program:* The State of Arizona intends to apply its rules of the NPDES program " . . . to discharges that are within Arizona, but not in 'Indian Country'. . . ." For the Navajo Nation, there are several facilities located on private lands ("islands") within the exterior boundaries of the Navajo reservation (i.e., Cameron, Sanders, etc.) that may lead to misunderstandings on who possesses actual NPDES program authority. It is the full understanding of

Navajo EPA that these islands are subject to tribal jurisdiction.

Response: EPA has approved the State of Arizona to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State, except for in Indian country. EPA retains authority to issue permits, and will continue to be the permitting agency, for any facility in Indian country, including facilities located on private lands within the exterior boundaries of reservations.

IX. Category: Request for Public Comment Extension

Comment; Bruce Nigel

Finally, due to the complexity of the issues surrounding the proposed delegation agreement and the blatant inadequacy of environmental protection proposed by ADEQ, it is requested that the period of public comment be extended until 31 October 2002 at earliest. This will allow those whose resources are seriously limited in comparison to the vested interests, who stand to profit from the proposed delegation (e.g., mining construction, and timber industries), to continue to investigate and submit cogent comments on the proposed delegation.

Response: Under Section 402(b) of the Clean Water Act, States may apply to EPA to administer the NPDES program. EPA must approve a State's application unless EPA determines that the State program fails to meet certain specified statutory requirements. Further, the statute provides that not later than ninety days after the date on which a State submits an application to

administer the NPDES program, EPA's authority to issue permits in that State is suspended, unless EPA disapproves the State's application. In making its best effort to meet this deadline, EPA must, among other things, consider, summarize and respond to significant public comments received on the State's application.

EPA takes very seriously its responsibility to provide the public with the opportunity to meaningfully participate in the decision making processes. In this instance, EPA must balance this with its responsibility to make a concerted effort to meet the statutory deadline. After weighing these responsibilities and reviewing its public participation efforts, EPA believes that the forty-five day public comment period that was afforded on this matter provided the public with an opportunity to meaningfully participate. Accordingly, EPA is denying the request for an extension.

X. Category: Ocean Discharge Criteria Pursuant to Section 403 of the CWA

Comment; Navajo Nation

Statement of the Attorney General, Page 5, *3. Authority to Apply Federal Standards and Requirements to Direct Discharges:* The State of Arizona Attorney General verifies that State laws provide authority to apply applicable federal effluent standards and limitations including "Ocean discharge criteria pursuant to Section 403 of the CWA." Section 403 applies to " . . . the territorial sea, the waters of the contiguous zone, or the ocean. . . ." Are there such waters in the State of Arizona?

Response: There are no such waters. The language cited in this comment is the language from the Clean Water Act.

As explained on page 6 of the Attorney General Statement under *Remarks of the Attorney General*: " . . . Since Arizona has no ocean boundary, we would not interpret the statutory authority to mandate the application of useless standards or criteria; thus, the adopted rules do not provide for ocean discharge criteria per CWA § 403."

XI. Category: Stringency of State NPDES Regulatory Authority

Comment; Bruce Nigel

For the reason stated below EPA should reject the authorization request.

The Code of Federal Regulations at Section 122.44 (d) allows, water quality standards and State requirements more "stringent than . . . [the] Clean Water Act [CWA] . . . to achieve water quality standards established under section 303 of the CWA."

The State legislative authority allowing the ADEQ authorization for the NPDES program, HB 2426, explicitly disallows any NPDES regulatory authority to be more stringent than the CWA.

This is clearly a conflict. The citizens of Arizona deserve the environmental protection that would be offered to them by regulations more stringent than the CWA. Further, a state government may not rescind the rights given to its citizens by Congress. The citizens of Arizona should not be forced to accept anything less than the full environmental protection offered by the CWA. Anything less than full protection would violate the "equal protection" clause of the Constitution.

The rejection of Arizona's request to administer the NPDES program is required. Accordingly, EPA should reject the Arizona application to be authorized for the NPDES protection.

The intent of this comment is to request that EPA deny Arizona's application for NPDES permit issuing authority.

Response: EPA disagrees with the comment. HB 2426 requires ADEQ to adopt by rule, a permit program that is consistent with, but no more stringent than, the requirements of the Clean Water Act for the point source discharge of any pollutant or combination of pollutants into navigable waters. 40 C.F.R. § 122.44(d) requires that, under certain conditions, NPDES permits include requirements in addition to, or more stringent than, promulgated effluent guidelines under sections 301, 304, 306, 307, 318, and 405 of the CWA. The Attorney General of the State of Arizona has certified that in her opinion the laws of the State provide adequate authority to carry out the NPDES program. The Attorney General states that A.R.S. § 49-203(A) (which codifies HB 2426) authorizes the Director of ADEQ to adopt rules and include permit provisions consistent with the requirements of the Clean Water Act. In addition to noting that ADEQ has incorporated by reference 40 C.F.R. § 122.44(d), the Attorney General concludes in her statement that ADEQ has the authority among other things to establish permit conditions, discharge limitations and standards of performance, including case by case effluent limitations. Therefore, EPA believes that ADEQ has the requisite authority to include permit conditions that are in addition in to or more stringent than promulgated effluent limitation guidelines or standards.

XII. Category: Endangered Species

Comment 1; Arizona Center for Law in the Public Interest

EPA Must Complete Formal Section 7 Consultation Prior To Any Decision Approving AZPDES Program.

Every federal agency must, "in consultation with and with the assistance of the [U.S. Fish and Wildlife Service], insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . " Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). In furtherance of these obligations, each federal agency is required to complete formal section 7 consultation with the U.S. Fish and Wildlife Service ("FWS") whenever an agency undertakes an action that "may affect listed species or critical habitat," unless the FWS determines "that the proposed action is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(a)-(b). "Effects" of an action include " . . . the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action . . . " 50 C.F.R. § 402.02. Furthermore, once the section 7 consultation has been initiated, the consulting federal agency is prohibited from making any "irreversible or irretrievable commitment of resources with respect to the agency action . . . " 16 U.S.C. § 1536(d).

There is no doubt that EPA's consideration and approval of the AZPDES program is an action mandating formal consultation under section 7 of the ESA. Indeed, EPA has acknowledged that approval of the AZPDES program may

affect numerous federally-listed species and designated critical habitats in Arizona and therefore, EPA requested initiation of formal consultation with FWS. [See Letter from Terry Oda to David Harlow dated June 21, 2002] However, formal section 7 consultation must be *completed* prior to any decision by EPA regarding the AZPDES program.

Response: EPA completed formal consultation with the U.S. Fish and Wildlife Service (FWS or Service) under section 7 of the Endangered Species Act (ESA), and considered the biological opinion of the Service, prior to making its determination to approve the AZPDES program.

Comment 2; Arizona Center for Law in the Public Interest

EPA Has Failed to Initiate Formal Section 7 Consultation.

Notwithstanding EPA's acknowledgment that it has a duty to formally consult with FWS regarding the AZPDES program, EPA has not yet properly initiated formal section 7 consultation. On August 20, 2002, FWS properly rejected EPA's request to initiate formal consultation based on EPA's failure to provide FWS with the basic information necessary, and required by law, for preparation of a Biological Opinion ("BO"). [See Letter from Brian Hanson to Terry Oda dated August 20, 2002 (hereafter referred to as "August 20th Letter".] The ESA and its implementing regulations require that written requests to initiate formal consultation must include, among other information, a "description of the specific area that may be affected by the action," and a "description of the manner in which the

action may affect any listed species or critical habitat and an analysis of any cumulative effects." 50 CFR 402.14(c)(2,4). As noted in the August 20th Letter, EPA failed to meet these minimum requirements. [See August 20th Letter stating, "We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14)."] Indeed, EPA's Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program, dated June 21, 2002, (hereafter referred to as "EPA's BE") is woefully deficient in several respects.

For example, EPA's BE fails to adequately assess the manner in which approval of the AZPDES program may affect listed species or critical habitat in Arizona. EPA asserts that "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 process for consultation *will no longer apply.*" [EPA's BE at 15 (emphasis added)] The procedural and substantive requirements of section 7 of the ESA are among the most fundamental and important protections afforded to listed species and critical habitat under the ESA. There is no question that NPDES permitting decisions have in the past and will, in the future, result in substantial negative impacts to listed species and critical habitat. Terminating section 7 consultations on NPDES permitting actions in Arizona will have monumental impacts on listed species and critical habitat. Yet, EPA's BE fails to analyze these likely impacts whatsoever. Indeed, EPA's BE fails to analyze the impacts of this action for even one of the 60 federally-listed species that EPA identified as likely to be affected. Instead, EPA simply

concludes that "any potential adverse effects to Federally-listed species or critical habitat" resulting from transfer of NPDES permitting authority to Arizona "would be insignificant and/or discountable." EPA's BE at 16. This conclusion is not only legally defective on its face – there is no "insignificant and/or discountable" exception for adverse effects under the ESA – but is completely unsupported by any meaningful analysis.

EPA's BE is also legally deficient because it fails to undertake any analysis of cumulative effects as required by the ESA. ESA implementing regulations define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. If the AZPDES program is approved by EPA, there is an absolute certainty that in the future, hundreds of state NPDES permits will be issued annually with the potential of causing substantial negative impacts to listed species and critical habitat. Yet, EPA's BE contains no discussion, let alone analysis, of even basic information essential to accurately assess these cumulative effects including, for example, how many NPDES permits are likely to be issued by the State of Arizona on an annual basis, what specific species and critical habitats are likely to be impacted by such permits, and how the specific species or critical habitat may be affected.

Response: EPA disagrees with the commenter. EPA believes that it has met all the requirements of ESA section 7 with respect to its proposed approval of the AZPDES program, including initiating section 7 consultation and providing appropriate information to the FWS to conduct an ESA section 7 consultation. As

indicated above, EPA and the FWS have completed the formal section 7 consultation process.

In requesting ESA section 7 consultation, EPA prepared a biological evaluation (BE) and provided information to the FWS that met the requirements of the ESA, including, among other things, a description of the area that may be affected by the action, a description of the manner in which EPA's action may affect any Federally-listed threatened or endangered species (listed species) or their designated critical habitat, and an analysis of any cumulative effects, as demonstrated in its June 21, 2002 submittal and EPA's follow-up letter to the FWS dated August 22, 2002 explaining how its June 21 submittal provided the necessary information.

First, EPA provided a description of the area and species that might be affected by the action. Part VII of the BE states (and EPA's August 22, 2002 letter reiterates), "As the location of future discharges cannot be anticipated, for purposes of this BE, the USEPA has determined that all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters may be affected by this action." A list of such species was provided in Appendix C to the BE. EPA also provided to the FWS by attachment to the August 22 letter a list of all NPDES permits authorized in the State of Arizona (excluding NPDES permits in Indian country) and, for each such permit, the facility address and the name of the receiving water if available.

Second, while the commenter may disagree with the analysis and conclusions in EPA's BE, the BE and EPA's August 22 letter clearly and adequately analyze effects of EPA's proposed approval action on listed species and

critical habitat, and explain the basis for EPA's conclusions about such effects. Among other things, the continuing requirements of the CWA, the requirements of the AZPDES program, and EPA's oversight of the AZPDES program will provide ongoing protection to listed species and critical habitat in Arizona following EPA's approval of the AZPDES program. For example, as discussed in detail in the BE, EPA and the FWS have signed a Memorandum of Agreement describing the manner in which EPA and the FWS will work together to ensure that States administering the NPDES program protect listed endangered and threatened species. *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* dated February 22, 2001 (National MOA). In the National MOA, EPA has agreed to utilize its oversight authority in a specific manner to protect listed species and critical habitat. Implementation of the MOA procedures will ensure, among other things, that the FWS has an opportunity to review and comment on draft AZPDES permits and work with ADEQ and EPA to address potential effects to listed species and critical habitat associated with the permits. As indicated in the BE, EPA is committed to following the procedures in the National MOA to continue to ensure the protection of listed species after our approval of the AZPDES program. As explained in detail in the BE, in light of these continuing protections, EPA concluded that its proposed approval action would be insignificant and discountable and therefore its approval

action was not likely to adversely affect listed species or critical habitat.[4]

Third, EPA's biological evaluation included an appropriate level of description and analysis of cumulative effects. EPA's BE explained that loss and degradation of habitat continues to occur in Arizona through home development on private land, commercial development, and other methods, that State lands continue to experience different actions such as mining, livestock grazing, recreational use that diminish the quality and quantity of habitat, and that these actions are not likely to decrease or cease in the future.

Fourth, to ensure that FWS had the benefit of reviewing information pertaining to endangered species presented by other parties interested in EPA's proposed program approval, EPA forwarded to FWS, by letters dated October 15, 2002 and October 25, 2002, all ESA-related comments received during the public comment period on EPA's proposed approval of the AZPDES program. Thus, the FWS considered the information in those comments during the consultation.

Last, EPA agrees with the commenter that ESA section 7 does not apply to State permitting actions, but disagrees

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[4] EPA notes that its determination that its proposed approval action was not likely to adversely affect listed species or critical habitat was appropriate in light of its finding that any effects would be insignificant or discountable. FWS has determined that an action is not likely to adversely affect listed species where effects on species are insignificant or discountable. See, e.g., *Endangered Species Consultation Handbook, Procedures for Conducting Section 7 Consultations and Conferences,* U.S. Fish and Wildlife Service and National Marine Fisheries Service, March 1998, at pp. xv-xvi, 3-12.

that EPA's approval action will result in monumental impacts on listed species and critical habitat. EPA notes that on December 3, 2002, FWS issued a biological opinion concluding that EPA's proposed approval of the AZPDES program is not likely to jeopardize the continued existence of affect listed species or designated or proposed critical habitat, thereby concluding the formal consultation process. The FWS also stated in its biological opinion that it does not anticipate that EPA's action will incidentally take listed species. EPA considered the opinion of the FWS, the Federal expert agency on listed species and their critical habitat, in proceeding with its approval action. See response to Comment 3 immediately below.

Comment 3; Arizona Center for Law in the Public Interest

EPA's Approval Of The AZPDES Program Will Jeopardize The Continued Existence Of Dozens Of Federally-Listed Species And Result In The Destruction Or Adverse Modification Of Critical Habitat.

EPA's approval of the AZPDES program is no small procedural matter for the approximately sixty endangered and threatened species in Arizona. As already noted, it is EPA's position that transferring the NPDES program to the State of Arizona will terminate application of the requirements of section 7 of the ESA with respect to NPDES permitting, thus eliminating one of the most important legal protections for these species and their habitats. Nonetheless, EPA asserts that such action will have at most "insignificant and/or discountable" impacts on listed species and critical habitat. One need look no

further than the substantial impacts that have and continue to occur to listed species and critical habitat in Arizona from EPA-issued NPDES permits, where the requirements of section 7 of the ESA are in effect, to understand that EPA's claim is simply incorrect.

Stormwater discharge and point source discharge permits for residential and commercial urban development projects often result in significant adverse impacts to listed species and critical habitat. Obvious adverse effects of such NPDES permitting include the elimination of listed species, destruction of occupied and unoccupied habitat, and adverse modification of designated critical habitat. These effects are often significantly multiplied when considered alongside impacts resulting from Clean Water Act section 404 permits. Other NPDES permit impacts include increased domestic water consumption, degradation of watershed and water quality conditions, and resulting harm to riparian or aquatic listed species and designated critical habitat, often many miles away from the permitted development.

The cactus ferruginous-pygmy owl ("pygmy owl") is one of dozens of species in Arizona impacted by projects and activities authorized by EPA's NPDES program. The pygmy owl is threatened primarily by past and ongoing destruction and fragmentation of habitat, particularly within the Tucson Basin, from urban and commercial development, much of which is authorized by NPDES permits. The harmful effects of NPDES permitting is also apparent in the San Pedro River basin where increased pollution is threatening the species that depend on that water-based ecosystem for survival. The FWS has detailed a number of concerns with regard to NPDES permitting in and around the San Pedro River basin including the

impacts of the effects of consumptive water use from urban development. [See Letter to Alexis Strauss from U.S. FWS dated April 27, 2000.] According to the FWS, annual groundwater withdrawals exceed replacement in the Sierra Vista subwatershed by roughly 7,000 acre-feet, and are ultimately expected to diminish or eliminate baseflow in the river. Listed species such as the southwestern willow flycatcher, Huachuca water umbel, spikedace and loach minnow, and their critical habitats, will all be affected by any such baseflow reduction. Groundwater pumping for new urban development is clearly an indirect effect of NPDES permitting in this region.

FWS has also detailed a number of harmful indirect effects of urban development in the Verde River basin of central Arizona. For example, in its December 26, 2001 Biological Opinion on the NPDES permit for the "Homestead at Camp Verde," a development project, the FWS found that: Urbanization near the Verde River has reduced the ability to establish dense riparian vegetation. Development has created and maintained the demand for domestic and industrial water use resulting in increased groundwater pumping and flood control structures that alter stream hydrology and also increases bridges, roads, vehicles, sand and gravel mining and other industrial and commercial uses detrimental to riparian habitat. Urbanization has also increased the demand for recreational use of remaining riparian areas for trails, campgrounds and use of river areas for off-road vehicles, etc. Developments and recreation increase trash, lawns, bird feeders, and habitat fragmentation, and as a result, an increase of predators or passerines such as cowbirds house cats, grackles, and ravens . . .

[Biological Opinion, Homestead at Camp Verde NPDES Permit, December 26, 2001.] Overuse of groundwater in the Verde River basin is also a major concern. According to FWS, "the extent of groundwater overdraft (water resources that are not being replenished) in [Chino and Verde valleys] ... was considered critical ... " *Id.* [Furthermore, urbanization also results in watershed degradation, including increased runoff, erosion, altered hydrogeomorphology, incision, lowered water table, and resulting losses of riparian vegetation. These indirect effects of NPDES permitting adversely affect Verde River basin riparian and aquatic habitats, and dependent federally listed species, including the Bald eagle, Southwestern willow flycatcher, loach minnow, spikedace, razorback sucker and their designated critical habitats.

The examples above are merely a sampling of the negative impacts that are likely to result from EPA approval of the AZPDES program. At present, these impacts must, at least, be examined through the ESA's section 7 consultation process. Once the program is transferred to the State, it is apparently EPA's position that section 7 consultation will rarely, if ever, occur, thereby substantially increasing the likely impacts of AZPDES permits on listed species and critical habitat. Notwithstanding EPA's claims to the contrary, neither the provisions of the Clean Water Act, Arizona's water quality standards, or EPA's proposed oversight of the AZPDES program are adequate substitutes for section 7 consultation under the ESA. In short, without a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program.

Response: EPA agrees that the substantive and procedural requirements of ESA section 7 do not apply to State NPDES permits issued pursuant to State law. EPA disagrees that its approval of the AZPDES program will jeopardize the continued existence of listed species and result in the destruction or adverse modification of their critical habitat. EPA also disagrees with the commenter's assertions that "[w]ithout a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program."

On December 3, 2002, FWS, the expert Federal agency on listed species and critical habitat, issued a biological opinion concluding that EPA's proposed approval of the AZPDES program is not likely to jeopardize the continued existence of listed species or designated or proposed critical habitat. The FWS also stated in its biological opinion that it does not anticipate that EPA's action will incidentally take listed species. EPA considered the opinion of the FWS in proceeding with its approval action. As stated above, during the consultation process, EPA forwarded to FWS for consideration all ESA-related comments received during the public comment period on its proposed approval of the AZPDES program. EPA believes that FWS appropriately considered all relevant information regarding the effects of the approval action on listed species and designated and proposed critical habitat in arriving at its conclusion, including a broad range of direct and indirect effects of EPA's approval action. The objections of the commenter relate primarily to the commenter's judgments concerning the effects of the AZPDES program approval on various species. We believe

that no information has been submitted which would indicate that the conclusions in FWS's biological opinion are incorrect.

Section 7 of the ESA and its implementing regulations require that EPA consult with FWS regarding the effects of its actions where EPA's action may affect listed species or critical habitat, and that EPA comply with the substantive requirements of ESA Section 7. EPA has complied with the ESA and its regulations in this regard.

The CWA authorizes States to administer the NPDES program under State law provided the State program meets the conditions specified in section 402(b) of the Act and EPA regulations. Section 402(b) states that EPA shall approve each submitted State program unless EPA determines that the State does not have adequate authority to meet the criteria in that section, which pertain to protection of water quality, permitting procedures, and enforcement. EPA has determined that the State of Arizona has met all such criteria. In addition, the FWS has concluded that EPA's approval of the AZPDES program is not likely to jeopardize the continued existence of listed species or designated or proposed critical habitat, or result in the incidental take of listed species. EPA concurs with this conclusion. Thus, EPA's program approval is appropriate.

Comment 4; Arizona Center for Law in the Public Interest

Unless and until the deficiencies described [in Comments 1 to 3 immediately above] are remedied, EPA lacks the authority to approve the AZPDES program.

Response: EPA disagrees. See response to Comments 1 through 3 immediately above.

Comment 5; Bruce Nigel

Examination of the delegation agreement and its concomitant documentation reveal that the ADEQ will offer no protection to endangered species or critical habitat if that department is allowed to issue its own NPDES permits. If the State of Arizona is allowed to issue its own NPDES permits, those permits will be at variance with the objectives of the CWA. The CWA specifically states as one of its goals to ensure the protection and propagation of species. Endangered species is obviously a subset of all species. Therefore, without protection for the endangered segment of "species," as the delegation agreement currently allows, any authority granted to the state would be in violation of the CWA. The CWA, in its delegation to states language, allows that any delegation should result in authority no less stringent than the Clean Water Act. The delegation request from Arizona should be rejected because the results of that delegation would translate into a state authority that is less stringent than the CWA. This would be due to the deficiency of protection offered to endangered species, resulting in a negative effect upon species propagation. Further, federal law requires all permits issued under the authority of the CWA to cause no adverse effect or "taking" upon an endangered or threatened species. This is effective when, in the parlance of those who are experienced with endangered species litigation, a "nexus" exists with a federal action. As the ADEQ proposes to accept, and EPA proposes to offer, federal funds for this program, a nexus will exist. Therefore, EPA should reject the application for NPDES

program delegation because the ADEQ will fail to provide that endangered and threatened species are not subject to a taking or affected adversely by the issuance of NPDES permits, or the activities authorized by those permits, even though a nexus indisputably will exist.

Response: EPA disagrees with the commenter that approval of the AZPDES program is not consistent with CWA requirements. As described above, the CWA authorizes States to administer the NPDES program under State law provided the State program meets the criteria specified in section 402(b) of the Act and associated EPA regulations. EPA has determined that the State of Arizona has met all such criteria, and the State's program therefore meets the requirements of the CWA. The commenter has not indicated which, if any, of these criteria he believes are not met by the State program.

EPA also notes that listed species and critical habitat are in fact provided with protection under the State's NPDES program. The CWA's goal to ensure the protection and propagation of species is carried out through numerous CWA programs, including, among others, the NPDES permitting program. By carrying out the NPDES permitting program under State law, ADEQ will in fact be providing protection to listed species by ensuring continued protection of water quality throughout the State. Also, we note that the State will provide notice to the FWS of proposed AZPDES permits, and has the authority to consider the views of the Service in appropriate cases. 40 C.F.R. §§ 124.10(c)(1)(iv)), 124.59(b) and (c).

It is not clear which "Federal law" the commenter refers to in the comment that "Federal law requires all permits

issued under the authority of the CWA to cause no adverse effect or 'taking' upon an endangered or threatened species." If the commenter is referring to the ESA, we disagree with the commenter's interpretation of the statute. For example, the commenter's interpretation fails to take into account that section 7(o) of the ESA creates exceptions to the prohibitions against "take" found in section 9 of the ESA. If the commenter is referring to the CWA, the approval criteria in CWA 402(b) do not require that the State of Arizona protect listed species or that AZPDES permits cause no adverse effect or "taking" upon an endangered or threatened species, regardless of how the permitting program is funded. In any event, the FWS has determined that EPA's approval action is not likely to jeopardize any listed species or result in the destruction or adverse modification of designated or proposed critical habitat, and does not anticipate that EPA's approval action will result in incidental take of listed species. EPA believes that its approval action is consistent with the requirements of the ESA and the CWA.

See also response to Comments 1 through 4 immediately above.

Comment 6; The State of Arizona Game and Fish Department

With the approval of this program, ADEQ's permitting actions would not be subject to Section 7 consultation under the Endangered Species Act. However, the department understands that Endangered Species Act issues have been addressed in the Memorandum of Agreement (66 FR 11202) between the EPA and U.S. Fish and Wildlife Service. This agreement will serve as a guideline for EPA, FWS, and the State of Arizona to

ensure that NPDES permits will not negatively impact endangered and threatened species.

The Department has worked cooperatively with ADEQ and applicants during the preliminary review of NPDES permit applications to ensure that potential impacts to special status species and other fish and wildlife resources are considered and addressed (avoided or minimized) early-on during the permitting process. We look forward to continuing this level of cooperation between our agencies, and to seek opportunities for potential habitat restoration or enhancements projects that benefit fish and wildlife in Arizona.

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 7; Greater Phoenix Chamber of Commerce and Arizona Chamber of Commerce

The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to

allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits. Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R.

§ 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) & R18-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act. See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants. Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be

taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved. The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

Private action outside of Section 7 that results in a "taking" (*i.e.*, killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS. This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the

application. See also response to Comment 8 in Category IV above for EPA's response pertaining to NHPA issues.

Comment 8; Withey Anderson & Morris

Identical to comment 7.

Comment 9; Homebuilders Association of Central Arizona

Identical to comment 7.

Comment 10; Arizona Association of Industries

Comment 7 incorporated by reference.

Response to Comments 8, 9, and 10: EPA appreciates the commenters' support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 11; Diamond Ventures Inc.

The U.S. Congress has expressed a strong preference to have states take the lead role in the protection of waters within their boundaries so long as sufficient program support is generated within states and so long as the statutory elements of the Clean Water Act are satisfied. The AZDES [sic] program has been designed consistent with the programs in place in 44 other states relative to the endangered species Act and Section 7 consultations with the U.S. Fish and Wildlife Service. Like other states that administer pollution discharge permits, procedures have been built into the AZDES [sic] program to provide the appropriate and legally mandated oversight of the program by EPA and U.S. Fish and Wildlife. The fact that

Arizona would not be subject to a Section 7 consultation requirement when issuing a permit under the AZDES [sic] program is not unusual and is, in fact, typical.

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 12; Navajo Nation

The public notice for the AZPDES program submission that appeared in the Federal Register (August 1, 2002, Volume 67, Number 148, Page 49916-49920) states that "EPA will not make a final decision on AZPDES program approval until after: . . . (2) completion of the ongoing consultations with the U.S. Fish and Wildlife Service on effects program approval may have on endangered or threatened species and their designated critical habitat; and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places." No documents comprising the AZPDES program submission discuss the AZPDES permit review procedures involving potential effects on endangered or threatened species and their designated critical habitats and historic properties or sites. For the AZPDES program submission, EPA Region 9 initiated formal consultation with the U.S. Fish and Wildlife Service on June 21, 2002. The Federal Register public notice imparts that EPA's action to delegate NPDES program authorization is itself a federal action requiring consultation under the ESA and NHPA but not the " . . . subsequent AZPDES permit actions. . . ." In the Navajo Nation's development of its own NPDES program

submission, Navajo EPA participated in extensive work (meetings, correspondences, teleconferences, etc.) starting in 1995 with the U.S. Fish and Wildlife Service, the New Mexico State Historic Preservation Officer (SHPO), and the Advisory Council for Historic Preservation (ACHP). Navajo EPA subsequently reached closure with ACHP concerning NNPDES [sic] permit actions and historic properties and sites. For NNPDES [sic] permit actions and endangered or threatened species and their designated critical habitats, EPA opted to progress toward the use of its proposed "national MOA" with the U.S. Fish and Wildlife Service. The intent was to have the "NPDES MOA Between the Navajo Nation and the U.S. Environmental Protection Agency Region 9" spell out how Navajo EPA see to it that NNPDES [sic] permit actions have no effect on endangered or threatened species and their designated critical habitat and on the preservation of historic properties. EPA's public notice of the AZPDES program submission without consultations completed with the U.S. Fish and Wildlife Service and the SHPO or without any ESA and NHPA discussion in permitting procedures gives the impression that EPA is utilizing a different (abbreviated) NPDES program approval format for the State of Arizona.

Response: In addition to completing all required procedural requirements for approval of the AZPDES program, and determining that the AZPDES program meets the requirements of CWA section 402(b), EPA has completed a formal consultation process with the FWS under section 7 of the ESA. As discussed in detail in EPA's BE and in the response to Comment 2 immediately above, EPA and the FWS have signed the National MOA which describes the manner in which EPA and the FWS

will work together to ensure that States and Tribes administering the NPDES program protect listed endangered and threatened species. EPA will follow this agreement with respect to its oversight of the AZPDES program. EPA believes that the procedures it followed for approving the AZPDES program are consistent with the requirements of the CWA and the ESA. See also response to Comment 7 in Category IV above for EPA's response pertaining to NHPA issues.

XIII. Category; Support for EPA Approval of AZPDES Program

Comment 1; Arizona Chamber of Commerce & Greater Phoenix Chamber of Commerce; Withey, Anderson & Morris; Home Builders Association of Central Arizona

Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are

maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices throughout the state, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

Increased understanding of local conditions. A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B).

More Efficiency. We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer

this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[5] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

Enhanced environmental protection. The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean

[5] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

The State of Arizona has shown a solid commitment to the AZPDES program. The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future,

the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

ADEQ is fully capable of administering this program. In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

The above comments were incorporated by reference by the Arizona Association of Industries

Comment 2; Diamond Ventures Inc.

Diamond Ventures, Inc. respectfully requests that EPA approve the application of ADEQ to administer the NPDES program. Support for this application comes from a wide range of "stakeholders" and a wide range of the regulated community. The application is fully supported by the State of Arizona with approval (by 2/3rd margin) by both houses of the Arizona Legislature. The Arizona Governor's Office and Arizona Legislature placed the highest priority upon this application and resulting program by establishing a full funding commitment to ADEQ for the administration of this program even though these are lean years for state government.

Our firm believes that the adoption of the program is good for the State of Arizona and strongly supports the transition of the permitting responsibility from EPA Region IX to ADEQ. The following reasons support this conclusion:

1) Local Control and Understanding of Local Conditions: A state agency is better prepared to understand and respond to local conditions in a manner that will result in improved environmental quality for future generations. The administration of NPDES program by the individual states has been embraced by the U.S. Congress through the Clean Water Act, and implemented in 44 states.

2) Improved Communications: Improved environmental protection is dependent upon the quality of communication between the regulatory agency and regulated community. ADEQ maintains offices in Phoenix, Tucson, and Flagstaff and is therefore in an advantageous position to maintain the highest quality and direct communication with the regulated community.

3) ADEQ Qualifications: ADEQ has demonstrated that it is fully capable of administering complex environmental programs. With committed resources, as mentioned above, the agency has extensive permitting and enforcement experience under the current NPDES and Aquifer Protection Permit programs. Contrary to certain criticisms leveled at ADEQ relative to the proposed application, ADEQ is fully capable to administer the Arizona Pollutant Discharge Permit program.

Comment 3; Pinnacle West Capital Corporation

Pinnacle West Capital Corporation (PAW) respectfully requests that the United States Environmental Protection Agency ("EPA") approve the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollutant Discharge Elimination System ("NPDES") program.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. The operation of this principle is demonstrated by the fact that all but six states have been authorized to administer the NPDES program. State administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for better communication and a better understanding of issues unique to Arizona. For example, the AZPDES enabling legislation allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B) (in part). In addition, additional operating and budget efficiencies can he achieved through the interaction of the AZPDES program with other state programs, such as Arizona's Aquifer Protection Permit program.

The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states.

As an entity regulated under the NPDES program, PAW and its subsidiaries recognize the benefits of working with regulators who can, and have, familiarized themselves with our facilities by visitation and interactions stemming from other regulatory programs. This familiarity increases efficiencies in all respects of

permit and compliance management, and it has the potential to increase the effectiveness of program implementation. We believe the ADEQ has prepared itself for AZPDES implementation at the high level.

Comment 4; Robson Communities

We strongly support ADEQ's application. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection. At the hearing we provided examples of where ADEQ availability allowed permitting and compliance issues to be resolved efficiently and expeditiously. For example, on one occasion, we received homeowner complaints about effluent discharges in washes near our Saddle Brooke community. With ADEQ assistance, we inspected the situation and were able to document that the discharges were stormwater-only. On another occasion, we had a particularly complicated NPDES permitting issue and a site visit by ADEQ cleared up the matter quickly. Both of these illustrate the value of having a water quality program that is operated at the State level.

We disagree with claims being made that ADEQ lacks the resources or ability to administer the AZPDES program. Rather, ADEQ has exhibited the clear ability to administer complex permitting programs both through its involvement with the NPDES program to date as well as its administration of the Aquifer Protection program, a

program developed entirely without federal oversight or direction.

ADEQ will have the necessary resources to carry out this program. The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states.

Comment 5; City of Phoenix

Please be advised that the City of Phoenix supports the State of Arizona request to operate the NPDES program within Arizona as outlined in the Federal Register announcement dated August 1, 2002 (67 FR 49916). The City of Phoenix participated in the stakeholder effort to develop the Arizona Pollutant Discharge Elimination System (AZPDES) Permit Program. Based on the level of discussions and communications that occurred during the stakeholder meetings, the City is confident that the State will devote the necessary resources to make the program a success. This obviously includes implementation of a program that meets the requirements of the Clean Water Act but also incorporates flexibility, where it exists, to consider the unique characteristics of the State's water environment.

The first step in this process is the approval to proceed by the United States Environmental Protection Agency (EPA). We respectfully ask that USEPA approval

be given to the State of Arizona to proceed without further delay.

Response to Comments 1-5: EPA appreciates the commenters' support. As with all comments submitted, EPA considered them in making its final determination to approve the State of Arizona's submission.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 03-71439

PETITION FOR REVIEW

(Filed April 2, 2003)

1. Defenders of Wildlife ("Defenders"), the Center for Biological Diversity (the "Center") and Craig Miller hereby petition for review of the Environmental Protection Agency's ("EPA") final rule approving the application of the State of Arizona to administer and enforce the Arizona Pollutant Discharge Elimination System ("AZPDES") Program. *See* Approval of Application by Arizona to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 67 Fed. Reg. 79629 (December 30, 2002) (Attached).

2. Defenders is a national nonprofit corporation headquartered in Washington, D.C. with offices throughout the United States, including Tucson, Arizona. Defenders has more than 400,000 members and supporters, many of whom reside in Arizona. Defenders is dedicated to the conservation of all native wild animals and plants in their natural communities. Defenders has

invested considerable organizational resources in protecting Arizona's native species of wildlife and their habitats and, in particular, the endangered cactus ferruginous pygmy-owl ("pygmy-owl"). Defenders will continue to monitor and aggressively advocate for the conservation of these species and their habitat. Defenders also regularly publishes, for use of its members, information regarding Arizona wildlife and habitat, including the pygmy-owl.

3. Defenders brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational and scientific activities involving Arizona's native wildlife and habitat, including the pygmy-owl. The interests of Defenders and its members in observing, studying, and otherwise enjoying Arizona wildlife, including the pygmy-owl, and their habitat, and in obtaining and disseminating information regarding these species, have been and will be harmed by EPA's approval of the AZPDES program, and by the failure of EPA to adequately address the impacts of its action on the survival and recovery of the pygmy-owl and other federally-protected species in Arizona, pursuant to section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. EPA's action, and its failure to comply with its obligations under section 7 of the ESA, has caused the loss of significant legal protections for endangered and threatened species in Arizona, including the pygmy-owl, and will result in the destruction of habitat which these species need to survive and recover. If the pygmy-owl's habitat and that of other listed species in Arizona is destroyed, then Defenders' members and staff will no longer be able to recreate in or otherwise enjoy this habitat. And if these species are

unable to survive and recover, then Defenders' members and staff will no longer be able to observe and otherwise enjoy these species in the wild.

4. The Center is a non-profit conservation organization based in Tucson, Arizona. The Center has been and will continue to be heavily involved in species and habitat conservation issues in Arizona. The Center's members and staff reside, work, and recreate within the range of the pygmy-owl and that of other listed species in Arizona, and otherwise derive enjoyment from Arizona's native wildlife and habitats, including the Sonoran desert ecosystem around Tucson, where the pygmy-owl and other species reside. The Center's staff and members have extensively studied the pygmy-owl and other listed species in Arizona and their habitat, and have worked tirelessly to protect them, and plan to continue doing so in the future. Information gathered by the Center regarding the pygmy-owl and other Arizona species and their habitat is disseminated regularly to its members and the public.

5. The Center brings this action on its own institutional behalf and on behalf of its members. The interests of the Center and its members in observing, studying, and otherwise enjoying the pygmy-owl and its habitat and other listed species in Arizona, and in obtaining and disseminating information regarding the survival of these species, have been and will be harmed by EPA's approval of the AZPDES program, and by the failure of EPA to adequately address the impacts of its action on the survival and recovery of the pygmy-owl and other federally-protected species in Arizona, pursuant to section 7 of the ESA. If the pygmy-owl's habitat and that of other listed species in Arizona is destroyed, then the Center's

members and staff will no longer be able to recreate in or otherwise enjoy this habitat. And if these species are unable to survive and recover, then the Center's members and staff will no longer be able to observe and otherwise enjoy these species in the wild.

6. Craig Miller is an employee and member of Defenders, and a resident of Pima County, Arizona. Mr. Miller has both a personal and professional interest in EPA's action and specifically, its impact on the pygmy-owl and its habitat, and other listed species in Arizona. Mr. Miller has frequently hiked, backpacked, climbed, skied, birded and studied wildlife extensively in the riparian and adjacent upland habitat of the pygmy-owl and that of other listed species in Arizona. Mr. Miller's professional interest in the pygmy-owl includes studying the species, broadening the scientific understanding of its biology and ecology, and helping with efforts to ensure the protection and recovery of the species and its habitat. Mr. Miller is a member of the pygmy-owl implementation group of the pygmy-owl recovery team. Mr. Miller intends to continue his personal and professional interests in the pygmy-owl and its habitat, and other listed species in Arizona, in the future.

7. Mr. Miller's interests in the pygmy-owl and its habitat, and other listed species in Arizona, have been and will be harmed by EPA's action. In approving the AZPDES program without fully complying with its obligations under section 7 of the ESA, EPA has failed to address the impacts of its action on the survival and recovery of the pygmy-owl and other listed species. EPA's action also means that the destruction and fragmentation of the pygmy-owl's habitat from commercial and residential development will proceed with little or no scrutiny under

the ESA. If the pygmy-owl's habitat continues to be destroyed and fragmented, the species will be unable to survive and recover.

Respectfully submitted,

April 1, 2003

/s/ [Illegible]

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67 Fed. Reg. 79629 (Dec. 30, 2002)

ENVIRONMENTAL PROTECTION AGENCY

FRL-7432-2]

State Program Requirements; Approval of Application by Arizona To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On December 5, 2002, the Regional Administrator for the Environmental Protection Agency, Region IX (EPA), approved the application by the State of Arizona to administer and enforce the Arizona Pollutant Discharge Elimination System (AZPDES) Program, for all areas within the State, other than Indian country. The authority to approve State programs is provided to EPA in section 402(b) of the Clean Water Act (CWA). The State will administer the approved program through the Arizona Department of Environmental Quality (ADEQ), subject to continuing EPA oversight and enforcement authority, in place of the National Pollutant Discharge Elimination System (NPDES) program previously administered by EPA in Arizona. The program is a partial program to the extent described in the section of this Notice entitled National Pollutant Discharge Elimination System (NPDES) program "Scope of the AZPDES Program." In making its decision, EPA considered and addressed all comments and issues raised during the public comment period.

DATES: Pursuant to 40 CFR 123.61(c), the AZPDES program was approved and became effective on December 5, 2002.

FOR FURTHER INFORMATION CONTACT: Matthew Mitchell, USEPA Region IX (WTR-5), 75 Hawthorne Street, San Francisco, CA, 94105, (415) 972-3508 or Chris Varga, Federal Permits Unit, Arizona Department of Environmental Quality, 1110 W. Washington St., Phoenix, AZ, 85007, (602) 771-4665. Part of the State's program submission and supporting documentation is available electronically at the following Internet address: http:// www.adeq.state.az.us/environ/water/permits/federal.html

SUPPLEMENTARY INFORMATION: Arizona's application was described in the **Federal Register** (67 FR 49916) on August 1, 2002, in which EPA requested comments. Notice of Arizona's application was published in the Arizona Republic on August 13, 2002. A public hearing on the application was held on September 4, 2002, in Phoenix, AZ.

Section 402(c)(1) of the CWA provides that ninety days after a State has submitted an application to administer the NPDES program, EPA's authority to issue such permits is suspended unless EPA disapproves or approves the State's application. 40 CFR 123.21(b)(1). This ninety day statutory review period ended on October 8, 2002. However, because of the many complex issues that were raised with respect to the State's program and the need to address them in a comprehensive manner, EPA was unable to make a final decision by October 8, 2002. Thus, EPA suspended issuance of NPDES permits in Arizona on October 8, 2002. However, failure to make a decision by the October 8, 2002 deadline did not mean that the State

automatically gained NPDES authority. It is EPA's interpretation that a State agency does not gain NPDES authority unless and until EPA approves the State program, consistent with CWA section 402(b) and 40 CFR 123.1. As of December 5, 2002, the ADEQ is now authorized to issue AZPDES permits under the CWA in all areas within the State, except for in Indian country.

A. Scope of the AZPDES Program

The AZPDES program is a partial program which conforms to the requirements of section 402(n)(3) of the CWA. Specifically, Arizona is being approved to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works.

Pursuant to CWA section 402(d), in specified circumstances EPA retains the right to object to AZPDES permits proposed by ADEQ, and if the objections are not resolved, to issue the permits itself. EPA also will retain jurisdiction over all NPDES permits it has issued in Arizona until ADEQ reissues them as AZPDES permits. Finally, EPA and State have agreed that EPA may retain permitting authority in certain limited circumstances, as set forth in the Memorandum of Agreement between EPA and ADEQ.

As part of operating the approved program, ADEQ generally will have the lead responsibility for enforcement. However, EPA will retains its full statutory enforcement authorities under CWA sections 308, 309, 402(i) and 504. Thus, EPA may continue to bring federal enforcement action under the CWA in response to any violation of the

CWA, as appropriate. In particular, if EPA determines that the State has not taken timely and/or appropriate enforcement action against a violator in Arizona, EPA may take its own enforcement action.

B. Public Comments

The EPA received numerous public comments concerning the Arizona program.

Several commenters urged the EPA to approve the State's program. The EPA agrees that the State program should be approved at this time outside Indian country.

Several commenters were concerned about impacts on endangered species and historic properties associated with EPA's approval of the AZPDES program. In addition, a few commenters urged that the EPA reject Arizona's program application on a variety of grounds.

All public comments are addressed in EPA's Response to Comments Document, dated December 5, 2002. In addition, EPA actions taken in accordance with the requirements of the Endangered Species Act and the National Historic Preservation Act are described below in Section C.

C. Other Federal Statutes

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), requires that federal agencies ensure, in consultation with the United States Fish & Wildlife Service (FWS) that actions they authorize, fund, or carry out are not likely to jeopardize the continued

existence of listed threatened or endangered species (listed species) or result in the destruction or adverse modification of critical habitat designated for such listed species.

EPA consulted with the FWS under section 7(a)(2) of the ESA regarding the effects of the AZPDES program approval on listed species and designated critical habitat. On December 3, 2002, the Service issued a biological opinion concluding that EPA's approval of Arizona's NPDES application is not likely to jeopardize the continued existence of listed threatened or endangered species or result in the destruction or adverse modification of their critical habitat. In the opinion, the FWS also stated that it does not anticipate that EPA's action will result in the incidental take of listed species. Issuance of the biological opinion with these findings concludes the consultation process required by ESA section 7(a)(2) and reflects the Service's agreement with EPA that the approval of the State program meets the substantive requirements of the ESA.

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), the Agency consults with the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer on federal undertakings that have the potential to affect historic properties listed or

eligible for listing in the National Register of Historic Places. During EPA's review of the Arizona NPDES application, EPA engaged in discussions with the Arizona SHPO regarding EPA's determination that approval of the State permitting program would have no effect on historic properties.

On August 23, 2002, EPA provided the Arizona SHPO's Office with EPA's determination that approval of Arizona's application would have no effect on historic properties in Arizona. As part of the coordination process, the SHPO's Office raised certain issues regarding approval of the Arizona program for further discussions. By letter dated September 23, 2002, the SHPO withdrew these issues for consideration and informed EPA that it was working with ADEQ to coordinate its activities in the protection of Arizona's cultural resources. On October 18, 2002, the SHPO and ADEQ entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive notices of certain proposed permit actions. This MOU further provides for coordination between ADEQ and the SHPO to resolve any identified issues to ensure that AZPDES permits will comply with Arizona water quality standards and Arizona laws protecting historic properties. For those permits with the potential to adversely affect historic properties, ADEQ and the SHPO agreed to seek ways to avoid, minimize or mitigate any adverse effects to historic properties stemming from the proposed permit. EPA believes that the agreement between ADEQ and the SHPO is consistent with EPA's determination that approval of the State permitting program would have no effect on historic properties.

Regulatory Flexibility Act

Based on General Counsel Opinion 78-7 (April 18, 1978), EPA has long considered a determination to approve or deny a State NPDES program submission to constitute an adjudication because an "approval," within the meaning of the APA, constitutes a "license," which, in turn, is the product of an "adjudication." For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a Federal agency proposes or promulgates a rule under section 553 of the Administrative Procedure Act (APA), after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule. Even if the NPDES program approval were a rule subject to the RFA, the Agency would certify that approval of the State's proposed AZPDES program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve an NPDES program merely recognizes that the necessary elements of an NPDES program have already been enacted as a matter of State law; it would, therefore, impose no additional obligations upon those subject to the State's program. Accordingly, the Regional Administrator would certify that this program, even if a rule, would not have a significant economic impact on a substantial number of small entities.

E. Notice of Decision

I hereby provide public notice that EPA has taken final action authorizing Arizona to implement the NPDES program in all areas of the State except for Indian Country.

Authority: This action is taken under the authority of section 402 of the Clean Water Act as amended, 42 U.S.C. 1342.

Dated: December 5, 2002.

Wayne Nastri,
Regional Administrator, Region IX.

[FR Doc. 02-32907 Filed 12-27-02; 8:45 am]

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION, AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA,

Applicants in Intervention.

Case No. 03-71439

HOME BUILDERS' MOTION TO INTERVENE AND SUPPORTING MEMORANDUM

(Filed May 1, 2003)

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Movant National Association of Home Builders, a non-profit corporation organized under the laws of Nevada, hereby states that it has no parent companies or subsidiaries, and that it has issued no shares of stock to the public; said association has more than 800 state and local home builders associations with whom it is affiliated, but all of those associations are, to the best of National Association of Home Builder's knowledge, non-profit corporation that have not issued stock to the public. Movant Southern Arizona Home Builders Association, a non-profit corporation organized under the laws of Arizona, hereby states that it has no parent companies or subsidiaries, and that it has issued no shares of stock to the public. Movant Home Builders Association of Central Arizona, a non-profit corporation organized under the laws of Arizona, hereby states that it has no parent companies or subsidiaries and that it has issued no shares of stock to the public. Both Southern Arizona Home Builders Association and Home Builders Association of Central Arizona are affiliated with National Home Builders Association.

MOTION TO INTERVENE

The National Association of Home Builders, the Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona (collectively, "Home Builders") hereby move for leave to intervene in this action pursuant to Rule 15(d), *Fed.R.App.P.* Home Builders have a protectable interest in the subject matter of this action, the Environmental Protection Agency's approval of the State of Arizona's application to administer the National Pollutant Discharge Elimination System ("NPDES") in Arizona. Home Builders, whose members are regulated under the NPDES Program, have invested

significant resources in the development of Arizona's program, the Arizona Pollutant Discharge Elimination System or "AZPDES," and will benefit from Arizona's administration of that program. Home Builders' interests may be impaired by disposition of this action in their absence, and the existing parties will not adequately represent Home Builders' position. Accordingly, Home Builders should be allowed to intervene in this action.

Home Builders' motion is supported by the following Memorandum of Points and Authorities and by the attached declarations of Alan Lurie, Executive Vice President of the Southern Arizona Home Builders Association, and Connie Wilhelm, President and Executive Director of the Home Builders Association of Central Arizona.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF MATERIAL FACTS AND HOME BUILDERS' INTERESTS.

One of the stated policies of the Clean Water Act ("CWA") is to "recognize, preserve, and protect the primary responsibilities and rights of States" in the restoration and maintenance of water quality and in application of the CWA. 33 U.S.C. § 1251(b). Indeed, one of Congress' primary objectives in enacting the CWA was to encourage states to "assume the major role in the operation of" the NPDES Program, which is one of the CWA's most important permitting programs. *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1430 (9th Cir. 1991), *quoting Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). In keeping with this objective, on December 5, 2002, the

Environmental Protection Agency ("EPA") approved the State of Arizona's application to administer the NPDES Program in Arizona. *See Approval of Application by Arizona to Administer the National Pollution Elimination System (NPDES) Program; Arizona,* 67 Fed Reg. 79,629 (Dec. 30, 2002) (copy attached to Petition). Arizona thereby became the forty-fourth state to receive program approval.

The NPDES Program is now being administered locally by the Arizona Department of Environmental Quality ("ADEQ") as the AZPDES Program, rather than by EPA's Region IX Office in San Francisco, California. The transfer was intended to "put[] the program in the hands of those most familiar with the environmental issues and the people of the state." *See* Region 9: News Releases, *EPA Approves Arizona Pollutant Discharge Permits Program* (Dec. 5, 2002) (copy attached as Exhibit A). The approval represents the culmination of more than two years' work by ADEQ, interested parties and industry groups, including Home Builders, to develop the necessary legal and administrative structure to support the AZPDES Program.

Home Builders were actively involved in and supported EPA's decision to transfer its NPDES program to ADEQ. *See generally* Lurie Declaration at ¶¶ 6, 11-19 (attached hereto as Exhibit B); Wilhem Declaration at ¶¶ 10-14 (attached as Exhibit C). Home Builders participated in the development of administrative rules designed to implement the AZPDES Program,[1] assisted in

[1] These rules are codified in Title 18, Chapter 9, Articles 9 and 10 of the Arizona Administrative Code.

the development of relevant legislation,[2] and participated in ADEQ's development of the State's equivalent to EPA's Storm Water Construction General Permit, designed to authorize small discharges of storm water containing pollutants with negligible environmental impacts resulting from construction activities.[3] Lurie Declaration at ¶¶ 11-18. Home Builders have invested significant time and money in these efforts because they will benefit from EPA's transfer of authority to the State, by way of reduced compliance costs and fewer and shorter project delays arising from permitting activities. *Id.* at ¶¶ 9-10; Wilhelm Declaration at ¶¶ 11, 16.

Interpreting the transfer of NPDES permitting authority to Arizona as being subject to Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), EPA "consulted" with the U.S. Fish and Wildlife Service ("FWS") pursuant to ESA Section 7(a)(2) and FWS's implementing regulations. *See Approval of Application, supra*, 67 Fed. Reg. at 79,630. In a biological opinion issued December 3, 2002, FWS determined that EPA's action was not likely to jeopardize the continued existence of any listed species of fish, wildlife or plants, and was not likely to destroy or adversely modify designated or proposed critical habitat for such species.

December 16, 2002, Petitioners Defenders of Wildlife and Center for Biological Diversity (collectively, "Defenders") filed an amended complaint against both EPA

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[2] These laws are codified at Arizona Revised Statutes, Title 49, Chapter 2, Article 3.1 and Chapter 4, Article 4.

[3] The State's construction general permit was finalized on February 25, 2003.

and FWS in the United States District Court for the District of Arizona challenging the biological opinion and, indirectly, EPA's approval of the AZPDES Program. *See Defenders of Wildlife, et al. v. Lt. General Robert B. Flowers, et al.,* CV-02-195-TUC-CKJ ("*Defenders v. Flowers*"). In that lawsuit, Defenders challenges FWS's finding that the transfer of the program to Arizona will not jeopardize the continued existence of the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and other unidentified species listed under the ESA. *Defenders v. Flowers,* Second Amended Complaint at ¶¶91-94. Defenders alleges violations of Section 7(a)(2) of the ESA and of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). *Id.* at ¶ 127.

On April 2, 2003, Defenders filed the instant Petition before this Court alleging substantially similar violations. *Compare, e.g.*, Petition at ¶ 3 ("The interests of Defenders and its members in observing, studying, and otherwise enjoying Arizona wildlife, including the pygmy-owl, and their habitat . . . have been and will be harmed by EPA's approval of the AZPDES program, and by the failure of EPA to adequately address the impacts of its action on the survival and recovery of the pygmy-owl and other federally-protected species in Arizona, pursuant to section 7 of the [ESA].") Defenders here assert that "EPA's action, and its failure to comply with its obligations under section 7 of the ESA, has caused the loss of significant legal protections for endangered and threatened species in Arizona . . . and will result in the destruction of habitat which these species need to survive and recover." *Id.* Defenders argue injury from destruction of the pygmy-owl's habitat because then their members and staff will no

longer be able to recreate in or otherwise enjoy this habitat or observe the species in the wild. *Id.* at ¶ 5.

If EPA's decision to approve the AZPDES Program is overturned by this Court, Home Builders will not receive the benefit of their diligent participation in the development of the State's program, and years of effort will have been eviscerated without Home Builders' input on the issues raised by the Petition.

Home Builders, if allowed to intervene, will assert that the Fifth Circuit's ruling in *American Forest & Paper Ass'n v. U.S.E.P.A.*, 137 F.3d 291 (5th Cir. 1998), is applicable in this case and that, consistent with that court's reasoning, Section 7 of the ESA ***does not apply*** to EPA's approval of the AZPDES Program. Home Builders also intend to challenge directly the Petitioners' standing to maintain this action. Such input will aid this Court in its evaluation of the Petition and will likely not be offered by any other party, including EPA.[4]

II. ARGUMENT.

A. Standard for Intervention Under Rule 15(d), *Fed.R.App.P.*

Rule 15(d), *Fed.R.App.P.*, does not specify an applicable standard for intervention. Rather, the criteria for granting intervention are determined by reference to the "statutory design of the Act" under review, in this case

[4] Based on its pleadings filed to date in *Defenders v. Flowers*, it is clear that the United States, for apparent policy reasons, does not intend to make these compelling – and potentially dispositive – arguments in EPA's defense.

the Clean Water Act, 33 U.S.C. §§ 1251 to 1387, and with reference to the policies underlying intervention under Rule 24, *Fed.R.Civ.P. See, e.g., Int'l Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 210 (1965); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985); *Canadian Tarpoly Co. v. U.S. Int'l Trade Comm'n*, 649 F.2d 855, 856 (C.C.P.A. 1981); 20 James Wm. Moore *et al., Moore's Federal Practice*, § 315.24 (3d ed. 1999); Wright, Miller & Cooper; *Federal Practice and Procedure*: Jurisdiction 3d, § 3961.4.

B. The Design of the CWA Militates in Favor of Home Builders' Intervention.

Section 509(b) of the CWA, 33 U.S.C. § 1369(b), the review provision pursuant to which the Petition was apparently filed, is silent on the issue of intervention in direct appeals of decisions made by EPA.[5] Therefore, this Court must first turn to the CWA's overall design to evaluate Home Builders' motion. *Int'l Union*, 382 U.S. at 210; *Texas v. U.S. Dep't of Energy*, 754 F.2d at 551.

As more thoroughly discussed below, Home Builders' members constitute the regulated community in this instance and are subject to the CWA's permitting and enforcement provisions. *See, e.g.*, 33 U.S.C. § 1342 (NPDES permits) and § 1319 (enforcement). Many of Home Builders' members require permits issued under the AZPDES Program. Lurie Declaration at ¶ 5; Wilhelm

[5] Nevertheless, Home Builders note that intervention in direct appeals under the CWA is routine. *See, e.g., Environmental Defense Center v. U.S.E.P.A.*, 319 F.3d 398 (9 Cir. 2003) (intervention by the Natural Resources Defense Council in an action challenging) EPA's "Phase Two" Storm Water Rules).

Declaration at ¶ 5-6. Such authorizations allow for discharges of pollutants associated with construction activities undertaken by Home Builders' members. Wilhelm Declaration at ¶ 5. Home Builders' members would lose the benefit of the AZPDES Program and would be stripped of permits and other authorizations approved under the program if this Court invalidated the program. Lurie Declaration at ¶¶ 27-28; Wilhelm Declaration at ¶¶ 16-17. *Compare Canadian Tarpoly*, 649 F.2d at 857 (holder of patent held to have sufficient interest potentially affected by adverse ruling on appeal to warrant intervention) *with Texas v. U.S. Dep't of Energy*, 754 F.2d at 551 (utilities whose role in statutory program was limited to finding had insufficient interest to warrant intervention). Home Builders should be allowed to intervene to protect their members' interests in their permits and their ability to obtain new permits under the AZPDES Program, which interests are jeopardized by the potential for an adverse ruling in favor of the Petitioners. *Int'l Union*, 382 U.S. at 212-213; *Canadian Tarpoly*, 649 F.2d at 857.

Further, the CWA's review provisions are cast in the broadest of terms. Section 509(b) of the CWA provides that "any interested person" may obtain review of the actions covered there indicating that relief should be had by all parties affected by EPA's actions. 33 U.S.C. § 1369(b)(1). Home Builders are clearly "interested persons" and would be entitled to file their own petition for review under this provision in the event EPA improperly withheld its approval for, among other reasons, impacts to species protected under the ESA. *Cf. Int'l Union*, 382 U.S. at 209 (discussing National Labor Relations Act's grant of review

to "any person aggrieved by a final order of the Board [of Labor Relations]"). Such inclusive review provisions indicate Congressional intent to allow ***all*** interested and affected parties to participate in, review proceedings authorized under CWA § 1369. *Id.*, 382 U.S. at 216-217.

In sum, Home Builders' interests created by the CWA and recognized in the broad participatory language of CWA § 509(b) militates in favor of Home Builders' intervention in the instant proceeding.

C. The Policies Underlying Rule 24, *Fed.R.Civ.P.*, Support Home Builders' Intervention.

Home Builders also satisfy the requirements of Rule 24, *Fed.R.Civ.P.*,[6] which is construed liberally in favor of potential intervenors like Home Builders and evaluated primarily based on practical considerations, not technical distinctions. *Southwest Center for Biological Diversity*, 268 F.3d at 818. Under this inclusive standard, Home Builders' motion should be granted because, as set forth in the Home Builders' declarations, and as explained below,

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[6] Rule 24(a)(2) inquiries are governed by a traditional four-part test: (1) whether Home Builders' motion is timely; (2) whether Home Builders claim a significantly protectable interest relating to the property or transaction that is the subject of this action; (3) whether Home Builders are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect that interest; and (4) whether Home Builders' interest is adequately represented by the existing parties to this action. *See, e.g., Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). Rule 24(b) requires only that the proposed intervenor assert a claim or defense in common with the main action. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1127 (9th Cir. 2002).

Home Builders have a protectable interest[7] in EPA's approval of the AZPDES Program and the manner in which EPA Section 7(a)(2) is applied to that approval. Home Builders' interests arise by virtue of their extensive participation in the development of the AZPDES Program, their status as permit holders subject to regulation and enforcement under the CWA and the NPDES program, and their entitlement to the benefits, contemplated by the CWA, of regulation by the State of Arizona. If EPA's decision is reversed by this Court, it will deny Home Builders the benefit of local regulation, and Home Builders are entitled to intervene to protect that interest. Finally, no party to this action will adequately represent Home Builders.

1. Home Builders' interest is sufficient to confer Article III standing and, therefore, satisfies the less strident test for intervention.

Initially, Home Builders note that persons affected by NPDES Program transfers have Article III standing to sue. *See, e.g.*, 33 U.S.C. § 1369(b)(1) (giving "any interested person" a right of review); *American Forest and Paper*

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[7] Home Builders' interest is measured by whether the interest claimed is related to the property that is the subject of the action. *See Sierra Club v. United States U.S.E.P.A.*, 995 F.2d 1478, 1484 (9th Cir. 1993); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). To demonstrate such interest Home Builders need only establish (1) that the interest asserted is protectable under some law, and (2) that there is a relationship between the interest being asserted and the claims at issue in this case. *Sierra Club*, 995 F.2d at 1484. For purposes of intervention, moreover, this Court accepts as true the well-pleaded, non-conclusory, allegations and evidence, including the declarations filed in support of this motion. *Southwest Center*, 268 F.3d at 819-820.

Ass'n, supra, (trade association had standing to challenge transfer of NPDES Program to Louisiana); *Citizens for a Better Environment v. U.S.E.P.A.*, 596 F.2d 720 (7th Cir. 1979) (challenge to EPA's approval of Illinois' program). Home Builders also would have Article III standing to initiate their own action against EPA or FWS concerning the performance of obligations under Section 7 as they relate to EPA's approval process. *See, e.g., Bennett v. Spear,* 520 U.S. 152, (1997) (ranchers and irrigation districts had standing to challenge biological opinion on operation of federal reclamation project based on their economic interests in the project). Accordingly, Home Builders meet the lesser burden required for intervention. *See, e.g., Yniguez v. State of Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (explaining that Article III standing requirements are "more stringent than those for intervention under rule 24(a)").

2. Home Builders' participation in the development of the AZPDES Program constitutes a sufficient interest to warrant intervention.

Home Builders have actively participated in the development of the AZPDES Program. Home Builders have advocated for the development of appropriate AZPDES legislation and administrative rules and for EPA's transfer of NPDES permitting authority to Arizona. *See* Lurie Declaration at ¶¶ 11-12, 14, 16-17. Home Builders assisted in the development of Arizona's Storm Water Construction General Permit, under which Home Builders' members will receive authorizations to discharge storm water in connection with their construction-related activities. *Id.* at ¶ 12, 15, 18-19; Wilhelm Declaration at

¶ 13-14. Such participation in the development of the AZPDES Program constitutes an interest warranting intervention. *See, e.g., Idaho Farm Bureau*, 58 F.3d at 1397 (public interest group entitled to intervene in action challenging measure it sponsored); *Washington State Bldg. and Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629-630 (9th Cir. 1982), *cert. denied sub nom. Don't Waste Washington Legal Defense Found. v. Washington*, 461 U.S. 913 (1982) (public interest group that sponsored challenged initiative legislation entitled to intervene as of right under Rule 24(a)(2)); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (National Organization for Women entitled to intervene in action challenging procedures for ratification of the Equal Rights Amendment, which the organization had supported.).

3. Home Builders have an interest in receiving the benefits of State administration of the NPDES Program.

As discussed above, Congress intended to "recognize, preserve, and protect the primary responsibilities and rights of States" in administering the CWA. 33 U.S.C. § 1251(b). This Court recently explained that the CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Environmental Defense Center*, 319 F.3d at 414, *quoting Arkansas v. Oklahoma*, 503 U.S. 91, 1010 (1992). The CWA encourages states to "assume the major role in the operation of" the NPDES Program. *Boise Cascade*, 942 F.2d at 1430. Accordingly, EPA is required to approve state NPDES programs that satisfy the nine requirements specified in CWA § 402(b),

33 U.S.C. § 1342(b), and cannot attach conditions based on ESA concerns. *American Forest and Paper*, 137 F.3d at 297-298. Both the State of Arizona and EPA believe that the AZPDES, administered by ADEQ, will function more efficiently than the NPDES administered by EPA's San Francisco office:

> This move represents a win for Arizona citizens and businesses. The public benefits from our consolidated oversight of water pollution control activities, and businesses benefit from reduced permit costs. As a result of the agreement ***ADEQ will be in a much better position to issue timely permits and also to enforce laws that protect the quality of Arizona's water resources.***

EPA News Release, (Exhibit A).

In *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980), this Court held that farmers intending to purchase lands pursuant to the Reclamation Laws had a sufficiently protectable interest in receiving the benefits Congress intended they receive when it enacted those laws to intervene in an action seeking to force the Department of the Interior to develop an environmental impact statement prior to promulgating rules authorizing such sales. 622 F.2d at 438. The Court explained that the farmers were "precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured if the Department of the Interior does not act expeditiously in accordance with the mandates of the reclamation acts and the [APA]." *Id.* Likewise, in this case, Home Builders' members are intended to benefit from Congress' objective of having the states administer the NPDES Program, as opposed to an EPA office located in another state. Home

Builders' members will be injured by any decision that overturns or otherwise clouds or delays the AZPDES Program. Projects will be delayed, permits may be pulled, and the home building industry will suffer. Lurie Declaration at ¶¶ 27-28.

4. Home Builders have a protectable interest in seeing Section 7 properly applied to EPA's decision.

In addition, Home Builders' members are also the intended beneficiaries of those provisions contained in Section 7(a)(2) and 50 C.F.R. Part 402 requiring use of the best scientific and commercial data available in conducting Section 7 consultations. *Bennett*, *supra*, 520 U.S. at 168 (explaining that this requirement protects the regulated community from "uneconomic (because erroneous) jeopardy determinations"). Home Builders have an interest in ensuring that Section 7 is properly applied in regard to EPA's transfer approval. Home Builders have a direct stake in the manner in which Section 7 applies to EPA's approval of Arizona's program and the manner in which FWS analyzes the effects of EPA's transfer because such analysis may impact the transfer itself. Indeed, Home Builders' members have suffered increased costs and unwarranted delay from erroneous and overzealous interpretations of the ESA in the past. Lurie Declaration at ¶ 24-26; Wilhelm Declaration at ¶¶ 7-8, 15.

5. Home Builders have a protectable interest in the NPDES Program under which Home Builders' members are regulated.

Home Builders' members have a direct interest in the manner in which the NPDES Program is administered (i.e., whether by EPA or ADEQ) because they are subject to regulation under that program. Most of Home Builders' members have or will attempt to obtain authorization to discharge storm water in connection with their projects, Lurie Declaration at ¶ 5, Wilhelm Declaration at ¶ 5-6. Home Builders, as the regulated community, have an interest in the manner in which such regulation takes place, and by whom. This is especially true when, as here, Home Builders' members will benefit from reduced compliance costs and fewer and shorter delays as a result of ADEQ's administration of the AZPDES. *See. e.g.*, *Natural Resources Defense Council v. U.S.E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992) ("NRDC's allegations and the potential economic impact of the rules on the intervenors [various industry and trade groups subject to regulation under EPA's storm water rules] satisfy the broad standing requirement applicable here.").

6. Home Builders' interest will be impaired by disposition of this action in Home Builders' absence.

Impairment, "follows from the factors" related to Home Builders' protectable interest. *Sierra Club*, 955 F.2d at 1486. In granting the City of Phoenix leave to intervene in *Sierra Club*, this Court found the requisite impairment because the relief sought by the plaintiffs would have constrained EPA in a manner inconsistent with the City's interest in its permit and the operation of its wastewater

treatment plant. Specifically, the Court explained that EPA would be bound in later proceedings by any declaratory or injunctive relief granted. The City would be unable to later put at issue the proper scope of EPA's regulatory duties because the case at bar would "have controlling force on those issues." *Id.*

As in *Sierra Club,* if Defenders prevails on its instant challenge, Home Builders would be unable to later argue the merits of whether EPA properly approved the AZPDES Program. This *stare decisis* effect is sufficient to constitute the "practical impairment" of Home Builders' interests. *Id. See also Int'l Union*, 382 U.S. at 213. The practical effect of relief in this action, moreover, will be to undo the transfer of the NPDES Program, injuring Home Builders' and their members, who hold state permits authorizing discharges into waters of the United States.

7. Home Builders are not adequately represented by the parties.

In determining whether Home Builders' interests will be adequately represented by an existing party, this Court should consider (1) whether the interest of EPA is such that it will undoubtedly make all the intervenors' arguments; (2) whether EPA is capable and willing to make such arguments; and (3) whether Home Builders would offer any necessary elements to the proceedings that other parties would neglect. *Southwest Center*, 268 F.3d at 822. While Home Builders bears the initial burden of demonstrating that it is not adequately represented, that burden is minimal; Home Builders need only demonstrate that the existing parties' representation "*may be*" inadequate. *Id.,* 268 F.3d at 823, *citing Trbovich v.*

United Mine Workers, 404 U.S. 528, 538, n.10 (1972). Moreover, in assessing the adequacy of representation, this Court should focus on the subject of the action, not the particular issues before it at the time of this motion. *Id.*

In this case, as in *Southwest Center,* the interests of EPA and of Home Builders will likely diverge. *See* 268 F.3d at 823-824 ("The interests of government and the private sector may diverge. On some issues Applicants will have to express their own unique private perspectives. . . ."). Simply put:

> [w]e have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the . . . [intervenors], ***a task which is on its face impossible.***

National Farm Lines v. ICC, 564 F.2d 381, 384 (10th Cir. 1977) (emphasis added). Unlike any of the parties involved in this action, Home Builders' members actually rely on the authorizations to be afforded under the AZPDES Program and are the ***only*** parties before this Court directly affected by and regulated under the AZPDES Program. In addition, Home Builders participated in the program development process as representatives of the regulated community. Home Builders, moreover, if permitted to intervene in this case, will provide a unique perspective not otherwise offered any other party. EPA's defenses, for example, may be strongly influenced by internal agency policies and similar factors affecting their ability to fully and aggressively defend the AZPDES Program. Put simply, the regulated community's viewpoints are likely to diverge from those of the government.

8. Home Builders Have a Claim or Defense in Common with the Petition.

At a minimum, Home Builders have a "claim or defense and the main action have a question of law or a fact in common." *See* Rule 24(b), *Fed.R.Civ.P.* Under this relaxed standard, recently addressed by this Court in *Kootenai Tribe*, Home Builders clearly would be allowed to intervene. In *Kootenai Tribe*, the intervenors, proponents of the so-called "Roadless Rule" limiting road development on National Forests, moved to intervene in a suit filed by various opponents of the rule. The proposed intervenors' asserted interests related to the rule and, after intervention was granted, asserted defenses of the rule directly responsive to the claims for injunctive relief asserted by the plaintiffs. 313 F.3d at 1110-1111. In upholding the district court's grant of intervention, this Court explained:

> The intervenors asserted defenses of the Roadless Rule directly responsive to the claim for injunction. Moreover, though intervenors do not have a direct interest in the government rulemaking, they have asserted an interest in the use and enjoyment of roadless lands and in the conservation of roadless lands, in the national forest lands subject to the roadless rule, and they assert "defenses" of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action.

Id. Given such common questions, this Court held that Rule 24(b)'s common question of law or fact requirement had been satisfied and that intervention was warranted.

For the reasons explained above, Home Builders have a significant interest in the AZPDES Program, under

which their members' activities will be regulated. Like the intervenors in *Kootenai Tribe*, Home Builders advocated for and supported the development of the AZPDES Program, which Petitioners now challenge in this proceeding. Home Builders, if allowed to intervene, will assert that, based on *American Forest & Paper Ass'n*, Section 7 of the ESA does not apply to EPA's actions. Home Builders also will challenge directly Petitioners' standing as falling short of that required by the Supreme Court in *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 884-85 (1990), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) and *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997). Such defenses are directly responsive to the issues presented by the instant Petition and speak to the Court's ability to hear this case.

III. CONCLUSION

Home Builders have a protectable interest in seeing the AZPDES Program succeed. That interest is created by, recognized, and protected under the CWA. Home Builders were proponents of the program and actively participated in and supported its development. Their members are currently regulated under the AZPDES Program. Because the disposition of this case in Home Builders' absence may significantly impair such interests, Home Builders should be allowed to intervene in this action.

RESPECTFULLY SUBMITTED this 30th day of April, 2003.

FENNEMORE CRAIG

By /s/ Norman D. James
Norman D. James
Thomas R. Wilmoth
Attorneys for Intervenors
National Association of Home
Builders; Southern Arizona
Home Builders Association;
Home Builders Association of
Central Arizona

Certificate of Service

I certify that copies of **HOME BUILDERS' MOTION TO INTERVENE** has been served via first-class regular mail on the following:

Copy of the foregoing mailed
this 30th day of April, 2003, to:

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EXHIBIT A

[LOGO] *U.S. Environmental Protection Agency*

EPA Approves Arizona Pollutant Discharge Permits Program

For Immediate Release: December 5, 2002
Contact: Wendy Chavez, U.S. EPA, (415) 947-4248
Press Office Main Line: (415) 947-8700

Arizona Becomes the 45th State With Regulatory Authority

SAN FRANCISCO The U.S. Environmental Protection Agency today approved Arizona's application to administer and enforce the pollutant discharge permits program, under the federal Clean Water Act.

The move will give the Arizona Department of Environmental Quality the authority to regulate facilities and municipalities that discharge pollutants into surface waters of the United States.

The Arizona Pollutant Discharge Elimination System program permits contain limits on what can be discharged, monitoring and reporting requirements, and other provisions to ensure that water quality and human health are protected.

Currently, there are 200 permits of which approximately 40 are renewed annually.

"This move represents a win for Arizona citizens and businesses," said Karen Smith, director of ADEQ's Water Quality Division. "The public benefits from our consolidated oversight of water pollution control activities, and businesses benefit from reduced permit costs. As a result of this agreement, ADEQ will be in a much better

position to issue timely permits and also to enforce laws that protect the quality of Arizona's water resources."

"This approval puts the program in the hands of those most familiar with the environmental issues and the people of the state," said Wayne Nastri, the EPA's regional administrator for the Pacific Southwest region. "The EPA is confident that the state will do a great job administering the program and will continue to protect our precious water resources."

Prior to the shift, the EPA issued permits to all facilities that discharged pollutants to surface waters in Arizona. The new delegation authority allows the ADEQ to issue permits and take action on any violations within the state.

The agreement represents more than two years of work, which required the state to demonstrate to the EPA that it has sufficient legal authority and ability to implement and enforce the Arizona Pollutant Discharge Elimination System permit program.

ADEQ will continue to work closely with the EPA to ensure that the Clean Water Act requirements are met. The EPA will review draft permits prepared by the state, oversee program requirements and performance, review proposed changes to state laws and rules related to the program, as well as review compliance actions.

The Arizona permitting program will cover all areas within the state except for those in Indian country, where the EPA retains jurisdiction.

For more information on the Arizona wastewater discharge permit program delegation, visit the EPA Web site at: http://www.epa.gov/region09/water/npdes/arizona.html.

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, and NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, Applicants in Intervention.	Case No. 03-71439

DECLARATION OF ALAN LURIE

I, ALAN LURIE, declare and state under penalty of perjury as follows:

1. I am a resident of Pima County, Arizona, over 18 years of age, and have personal knowledge of the matters contained herein.

2. I am currently the Executive Vice-President of the Southern Arizona Home Builders Association ("SAHBA"). I have held this position since 1990. In such capacity, I am familiar with and have knowledge of the activities of SAHBA and its members. I am also familiar with, and have knowledge of, the home building and real estate development industry in southern Arizona.

3. SAHBA is a non-profit corporation organized under the laws of the State of Arizona. SAHBA was formed in 1953 to provide a vehicle for businesses in the housing and building trades industries in southern Arizona (including Pima, Cochise and Santa Cruz Counties) to address issues and concerns relating to those industries. SAHBA presently has approximately 675 member firms, which include real estate developers, homebuilders, contractors, consultants, title insurance companies and other businesses in southern Arizona involved in and dependent on the home building industry. These members employ in excess of 30,000 persons. SAHBA provides assistance to its members, as well as the building industry in general, by providing information, meeting with legislators and agencies, drafting and commenting on legislation and agency rules and, when necessary, participating in litigation in federal and state courts.

4. SAHBA is a member of the National Association of Home Builders ("NAHB"). NAHB is a national trade association consisting of more than 200,000 builder and associate members organized into more than 800 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. NAHB provides assistance to its members, like SAHBA, on various legislative, regulatory and legal matters affecting the home building and related industries throughout the country.

5. Home building and other construction activities in southern Arizona often involve authorization to discharge construction-related storm water into desert washes that are considered "waters of the United States" under Section 402 of the Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES"). Such authority has historically been granted by the United States Environmental Protection Agency ("EPA") through a regional office located in San Francisco, California. While SAHBA's members often disagree about the scope of EPA's jurisdiction to regulate such activities, especially when the receiving water is a desert wash, as a practical matter it is often more expeditious to obtain authorization than debate about EPA's jurisdictional reach. Thus, most developers in southern Arizona will obtain authorization in connection with their development if a desert wash exists on their property, a very common situation.

6. Because its members are affected by the manner in which the NPDES Program is administered, SAHBA has closely followed the actions of the EPA and the Arizona Department of Environmental Quality ("ADEQ") with respect to EPA's transfer of NPDES permitting and enforcement responsibility to Arizona and ADEQ's development of a State permitting program.

7. On December 5, 2002, EPA approved the State of Arizona's Pollutant Discharge Elimination System ("AZPDES") Program. ADEQ will now administer that program, and EPA will cease new permitting actions under the NPDES Program in Arizona. I do understand that there are some exceptions, which are immaterial to SAHBA.

8. Due to EPA's approval of the AZPDES Program, SAHBA's members who formerly obtained permits and authorizations through Region IX of the EPA in San Francisco, California will now be able to obtain those permits and authorizations directly from ADEQ under the AZPDES Program.

9. According to recent statements, both EPA and ADEQ believe that the AZPDES Program will be more efficiently run by ADEQ than by EPA. *See* EPA Press Release dated December 5, 2002, attached to the Home Builders' Motion to Intervene in this action as Exhibit A. I understand that part of the reason for this increased efficiency is the doubling of full time employees in Arizona devoted to administration of the AZPDES Program. I further understand this means ADEQ will have ten times as many employees available to administer the AZPDES Program as EPA has available to administer the NPDES Program in Arizona.

10. SAHBA and its members anticipate that the AZPDES Program will result in a more efficient program for regulating discharges associated with the construction-related activities in which its members engage. For example, if a compliance issue arises that requires a "face-to-face" meeting with regulators, SAHBA's members will no longer be required to travel to EPA's office in San Francisco. The meeting can be held in Phoenix with ADEQ. This should mean lower compliance costs and fewer and shorter project delays associated with permitting activities. SAHBA and its members, therefore, are very interested in seeing EPA's approval of the AZPDES Program upheld and that Program succeed.

11. For this reason, over the past two years, SAHBA representatives have directly participated in the development of the AZPDES Program and have supported EPA's decision to approve the AZPDES Program. SAHBA actively participated in the development of the AZPDES Program's substantive and procedural administrative rules, participated in the development of the Memorandum of Agreement between EPA and ADEQ that now governs administration of the AZPDES Program, and are assisted with the development of ADEQ's version of the Storm Water Construction General Permit ("CGP") authorizing certain discharges related to construction of residential developments. A brief history of SAHBA's efforts since 2001 is summarized below.

12. Beginning in early 2001, SAHBA participated in ADEQ's Construction Storm Water Working Group, which was part of ADEQ's stakeholder process in advance of its AZPDES Program rulemaking. The Working Group specifically addressed issues concerning the development of ADEQ's CGP designed to authorize construction-related storm water discharges.

13. In June 2001, SAHBA participated in ADEQ's Working Group regarding the development of a Memorandum of Agreement between EPA and ADEQ that now governs administration of the AZPDES program.

14. In July 2001, SAHBA participated in ADEQ's Working Group meetings regarding development of the AZPDES Program's implementation rules. On September 19, 2001, at a public hearing conducted by ADEQ in regard to the proposed AZPDES Program's rulemaking, SAHBA, through its attorneys, offered testimony in support of ADEQ's rulemaking efforts. In December 2001, SAHBA

attended a stakeholders meeting regarding AZPDES Program's rule development and the status of ADEQ's development of its own construction general permit.

15. On May 21, 2002, SAHBA co-authored and presented to ADEQ a proposed draft version of the AZPDES general permit for storm water discharges from construction activities.

16. On July 23, 2002, SAHBA provided ADEQ with written comments regarding appropriate AZPDES Program timeframes in response to ADEQ's Notice of Proposed Rulemaking regarding licensing time frames.

17. Representatives of SAHBA provided testimony expressing their support of ADEQ's application to obtain AZPDES Program approval from EPA during public hearings jointly conducted by ADEQ and EPA in September 2002. On September 13, 2002, SAHBA provided written comments publicly expressing its support of ADEQ's application to obtain AZPDES Program approval from EPA and suggestions for its effective implementation.

18. SAHBA has most recently been active in helping to develop the State's CGP. On December 17, 2002, for instance, SAHBA attended an informal meeting conducted by ADEQ at the Arizona Industrial Commission regarding the draft general permit, and on December 19, 2002 SAHBA provided ADEQ comments on the draft general permit.

19. The State's CGP was finalized on February 25, 2003. Many of SAHBA's members' activities qualify for coverage under the CGP, and a significant amount of the storm water discharges from construction projects

conducted by SAHBA's members are or will be authorized under the State's CGP.

20. In the absence of the CGP, SAHBA's members would be required to apply for individual permits to discharge under Section 402 of the Clean Water Act. Substantial delays would result if projects covered by the CGP were forced to obtain individual permits. SAHBA's members derive significant economic benefit from the application of the CGP in the form of reduced compliance costs and fewer project delays that would otherwise result from obtaining individual permits.

21. I have reviewed the petition filed by the Defenders of Wildlife ("Defenders") and others in this action and understand that Defenders is concerned with the manner in which the federal agencies have assessed the impacts of EPA's approval of the AZPDES Program on the cactus ferruginous pygmy-owl and other species protected under the Endangered Species Act ("ESA"). SAHBA has also been concerned with the manner in which such impacts are assessed.

22. The listing of the Arizona pygmy-owl population as an "endangered species" has resulted in the imposition of restrictions on land use and other requirements, such as extensive surveys in areas both within and outside of critical habitat, that are adversely affecting SAHBA's members in a number of different ways. In the background discussion in its final rule listing the Arizona pygmy-owl population as an "endangered," which was published in the Federal Register in March 1997, FWS specifically identified housing and development projects in the Tucson area as threats to the owl. Thus, FWS has specifically targeted residential housing projects and other real estate

development in the Tucson area by identifying those activities as a reason for considering the Arizona population of pygmy-owls to be "endangered."

23. SAHBA previously participated in litigation with FWS in connection with its listing of the pygmy-owl as an "endangered" species under the ESA and the subsequent designation of critical habitat for the pygmy-owl, along with the National Association of Home builders [sic] and the Home Builders Association of Central Arizona. SAHBA and the other Associations, who are also moving to intervene in this action, prevailed in their challenge to the original designation of critical habitat for the pygmy-owl. *Nat'l Ass'n of Home Builders, et at v. Babbitt et al.,* No. CV-00-0903-PHX-SRB (Order Sept. 21, 2001). The district court upheld FWS's decision to list the Arizona pygmy-owl population, however, and the Associations have appealed the district court's decision to this Court.

24. SAHBA members have historically and are currently experiencing substantial delays as a result of having to "consult" with FWS pursuant to Section 7 of the ESA in order to obtain permits under the Clean Water Act. The primary issue involved in most such consultations is the impact on the pygmy-owl. Under FWS's consultation handbook, the consultation's scope is not limited to the effect of the discharge authorized on the desert wash, but also extends to the effect of the entire development with which the discharge is associated. This means that, while the area directly affected by the discharge is very small, FWS's analysis may extend to thousands of acres of land outside the desert wash.

25. To my knowledge, the quality of the discharge and the ability to meet Clean Water Act requirements has never been an issue in these consultations; rather, it is the activity occurring outside the desert wash that is of most concern the FWS. SAHBA members frequently complain that FWS is imposing conditions and requirements as part of the consultation that dramatically change their project. I understand that FWS is severely limiting on-site clearing and land development activities and is also requiring the dedication of substantial amounts of off-site land as permanent pygmy-owl preserves to mitigate impacts. For example, members are being told by local FWS employees that they must develop at very low densities, such as one house per three acres of land, notwithstanding local zoning, which renders most residential subdivision projects uneconomical.

26. In short, FWS's decision to list the pygmy-owl and to designate critical habitat for that species has greatly complicated the process by which the NPDES Program is administered in Arizona. Federal agencies have been "consulting" on the effects of activities authorized under the NPDES Program on the pygmy-owl in areas where pygmy-owls have not been documented and in areas that have not been designated as critical habitat in accordance with the ESA.

27. Reversal of the EPA's transfer decision would cause severe injuries to members of SAHBA as well as the Pima County real estate industry generally. It would deny SAHBA members the benefit of streamlined Clean Water Act compliance and the convenience of working with local authorities rather than faceless bureaucracies in San Francisco. It might also result in the invalidation of permits and authorizations for projects already authorized, which

may halt the projects indefinitely and, ultimately, cause serious injury to landowners and developers, who have already invested considerable resources to construct roads, utilities and other improvements.

28. Many other persons will be injured if the EPA's decision is overturned. For example, in some cases, portions of the affected projects have been purchased by builders, who have already commenced home construction, while in other cases the developer (who is also the builder) has built and sold homes. Thus, in some of these projects, individuals have already purchased homes or improved lots intending to build homes. Reversal of EPA's transfer decision may cause all work in these projects to halt, jeopardizing the continued viability of the projects and injuring individuals who were not involved in the permitting process. Project delays will force contractors and subcontractors to cease work, resulting in temporary layoffs and similar problems. Project delays and work stoppages will have other adverse impacts, such as a decline in the purchase of building supplies and materials. Moreover, state and local governments will lose revenues in the form of reduced sales taxes and, ultimately, property taxes as a result of project delays and work stoppages. While it is difficult to quantify these financial impacts, they will certainly occur.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2003, in Tucson, Arizona.

/s/ Alan P. Lurie
ALAN LURIE

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, and NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION, AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, Applicants in Intervention.	Case No. 03-71439

DECLARATION OF CONNIE WILHELM

I, CONNIE WILHELM, declare and state under penalty of perjury as follows:

1. I am a resident of Maricopa County, Arizona, over 18 years of age, and have personal knowledge of the matters contained herein.

2. I am currently the President and the Executive Director of the Home Builders Association of Central

Arizona ("HBACA"). I have held these positions since 1988. In such capacity, I am familiar with and have knowledge of the activities of HBACA and its members, as well as the home building industry in central Arizona generally.

3. HBACA is a non-profit corporation organized under the laws of the State of Arizona. HBACA was formed in 1951 to provide a vehicle for businesses in the housing and real estate development industries in central Arizona (including Maricopa and Pinal Counties) to address issues and concerns relating to those industries. HBACA presently has approximately 850 members, which include real estate developers, home builders, subcontractors, banks, utilities, title and mortgage insurance companies and other businesses in central Arizona involved in and dependent on the home building industry. HBACA provides assistance to its members, as well as the building industry in general, by providing information, reducing costs caused by regulation, taxes and other governmental actions, meeting with legislators and agencies, drafting and commenting on legislation and agency rules and, when necessary, participating in litigation in federal and state courts.

4. HBACA is a member of the National Association of Home Builders ("NAHB"). NAHB is a national trade association consisting of more than 200,000 builder and associate members organized into more than 800 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. NAHB provides assistance to its members, like HBACA, on various legislative, regulatory and legal matters affecting the home building and related industries throughout the country.

5. Home building and other construction activities in central Arizona often involve authorization to discharge construction-related storm water into desert washes that are considered "waters of the United States" under Section 402 of the Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES"). Such authority has historically been granted by the U.S. Environmental Protection Agency ("EPA") through a regional office located in San Francisco, California. These authorizations provide what FWS refers to as a "federal nexus," requiring compliance with Section 7 of the Endangered Species Act ("ESA"), which in turn may require "consultation" with the U.S. Fish & Wildlife Service ("FWS").

6. While HBACA's members often disagree about the scope of EPA's jurisdiction to regulate such activities, especially when the receiving water is a dry desert wash, as a practical matter it is often more expeditious to obtain authorization than debate about EPA's jurisdictional reach. Thus, most developers in central Arizona will obtain authorization in connection with their development if a desert wash exists on their property, and thereby create a federal nexus for Section 7 purposes.

7. HBACA and its members have closely followed the listing of the Arizona population of the cactus ferruginous pygmy-owl as an "endangered" species under the ESA in 1997 and FWS's continuing efforts to re-designate critical habitat for that population of owls. Despite the fact that pygmy-owls have not occupied lands north of the Gila River for at least 30 years, and the fact that the areas in which HBACA members conduct the majority of their real estate projects have not been identified as containing the key features of pygmy-owl habitat, FWS continues to place onerous requirements on HBACA's members, who need

NPDES authorizations in connection with their construction activities.

8. It is common that, as a result of "negotiations" with FWS and EPA concerning the impacts of storm water discharges on the pygmy-owl, major project modifications are required to accommodate the species (even if it has not been detected on the project), and thereby avoid having to go through formal Section 7 consultation to obtain NPDES authorization. Such modifications are often memorialized in recorded easements or covenants, conditions and restrictions and are, therefore, binding on the property forever.

9. HBACA is participating in litigation with FWS in connection with its listing of the Arizona pygmy-owl population as an "endangered species" under the ESA and the subsequent designation of critical habitat for that population. HBACA, along with the other Associations moving to intervene in this action, prevailed in their challenge to the designation of critical habitat for the pygmy-owl before Judge Susan Bolton. *Nat'l Ass'n of Home Builders, et al. v. Babbitt et al.*, No. CV-00-0903-PHX-SRB (Order Sept. 21, 2001). The district court upheld FWS's decision to list the Arizona pygmy-owl population, which decision is now on appeal before this Court.

10. Because its members are affected by the manner in which the NPDES Program is administered, HBACA has closely followed the actions of the EPA and the Arizona Department of Environmental Quality ("ADEQ") with respect to EPA's transfer of NPDES permitting and enforcement responsibility to Arizona.

11. On December 5, 2002, EPA approved the State of Arizona's Pollutant Discharge Elimination System

("AZPDES") Program. ADEQ will now administer that program, and EPA will cease new permitting actions under the NPDES Program in Arizona. I do understand that there are some exceptions, which are immaterial to HBACA. Due to EPA's approval of the AZPDES Program, HBACA's members who formerly obtained permits and authorizations through Region IX of the EPA in San Francisco, California will now be able to obtain those permits and authorizations directly from ADEQ under the AZPDES. HBACA and its members anticipate that the AZPDES will result in a more efficient program for regulating discharges associated with the construction-related activities in which its members engage with lower compliance costs and fewer and shorter project delays associated with permitting activities. HBACA and its members, therefore, are very interested in seeing the AZPDES Program upheld and that program succeed.

12. For this reason, over the past two years, HBACA representatives have directly participated in the development of the AZPDES Program and have supported EPA's decision to approve the AZPDES Program. HBACA actively participated in the development of the AZPDES Program's substantive and procedural administrative rules and in the development of the Memorandum of Agreement between EPA and ADEQ that governs the administration of the AZPDES Program, and HBACA assisted with the development of ADEQ's version of the construction general permit ("CGP"). A brief history of HBACA's efforts since 2001 is summarized below.

13. In early 2001, HBACA began participating in ADEQ's Construction Storm Water Working Group. In June 2001, HBACA participated in ADEQ's Working Group regarding the development of a Memorandum of

Agreement between EPA and ADEQ that now governs administration of the AZPDES. In July 2001, HBACA participated in ADEQ's Working Group meetings regarding development of the AZPDES implementation rules. In September 2002, HBACA provided written comments publicly expressing its support of ADEQ's attempts to obtain AZPDES approval from EPA and suggestions for its effective implementation.

14. HBACA has most recently been active in helping to develop the State's CGP. HBACA previously co-authored and presented to ADEQ a proposed draft version of the AZPDES general permit for large and small construction activity. On December 17, 2002, HBACA attended an informal hearing conducted by ADEQ at the Arizona Industrial Commission regarding the general permit, and on December 19, 2002, HBACA provided ADEQ comments on the draft general permit.

15. I have reviewed the petition filed by the Defenders of Wildlife and other plaintiffs in this action ("Defenders") and understand that Defenders objects to the manner in which the federal agencies have assessed the impacts of EPA's approval of the AZPDES on the pygmy-owl and other species listed under the ESA. For the reasons discussed above, HBACA has also been concerned with the manner in which such impacts are assessed.

16. HBACA and its members will benefit from EPA's transfer of NPDES permitting authority to ADEQ, which is why we have devoted substantial time and effort in supporting the transfer. ADEQ's administration of the AZPDES Program promises to be more efficient and will not involve the delays and communication problems often experienced when dealing with EPA's San Francisco office.

If EPA's decision to approve the AZPDES is overturned, the progress we have made during the past two years in developing the AZPDES Program and obtaining approval from EPA will be for naught. Because of the obvious benefits to our members and the amount of effort spent to develop the AZPDES Program, HBACA wants to insure that the AZPDES Program is successful and survives legal challenges, such as those brought by Defenders in this action

17. Finally, I understand that the NPDES Program cannot simply be "given back" to EPA if the AZPDES Program is invalidated due to the provisions of the CWA. There is, therefore, concern among HBACA's members as to what will become of the NPDES permitting program in Arizona if the EPA's decision to approve the AZPDES Program is overturned. It is unclear when, how, if, or by whom authority will be granted under the CWA for our members' development activities in that event.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27, 2003, in Phoenix, Arizona.

/s/ Connie Wilhelm
Connie Wilhelm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEFENDERS OF WILDLIFE, et.al., Plaintiffs, vs. LT. GENERAL ROBERT B. FLOWERS, et.al., Defendants.	No. CIV 02-195-TUC-CKJ **ORDER** (Filed Jul. 17, 2003)

As set forth below, consistent with this Court's June 2, 2003 Order (Doc. # 151), this Court hereby severs Claim 7 of Plaintiffs' Second Amended Complaint and transfers it to the United States Court of Appeals for the Ninth Circuit.

Procedural Background

On June 2, 2003, this Court found that it lacks subject matter jurisdiction over Claim 7 of Plaintiffs' Second Amended Complaint – i.e., Plaintiffs' challenge to the United States Fish and Wildlife Service's issuance of a December 3, 2002 Biological Opinion on the Effects of the Environmental Protection Agency's Transfer of its National Pollutant Discharge Elimination System program for Arizona to the State of Arizona – as the United States Court of Appeals for the Ninth Circuit has exclusive jurisdiction over this challenge. *See* Doc. # 151. Furthermore, it indicated its intent to sever Claim 7, pursuant to Rule 21, Fed. R. Civ. P., and transfer it to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1631. However, it granted the

parties and interested intervenors the opportunity to advise this Court if they wished to proceed in a different manner with respect to Claim 7. The Court is now in receipt of memorandums from Plaintiffs Defenders of Wildlife and the Center for Biological Diversity ("Defenders"), the United States Fish and Wildlife Service ("USFWS"), and the intervenors National Association of Home Builders, Southern Arizona Home Builders Association, and Home Builders Association of Central Arizona (collectively, "Home Builders"). No response was filed by intervenor State of Arizona nor intervenors Saguaro Ranch Investments LLC and Saguaro Ranch Development Corporation ("Saguaro Ranch").

In their response, Defenders indicated their desire to have Claim 7 adjudicated on the merits as expeditiously as possible. As such, they recommended that (1) if the USFWS represents to this Court that it will not object to the transfer of Claim 7 to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and it will not argue that the Ninth Circuit lacks jurisdiction to dispose of Claim 7 on the merits, this Court should sever and transfer Claim 7, and (2) if the USFWS opposes transfer and states that it will object to the Ninth Circuit asserting jurisdiction over and rendering a decision on the merits of Claim 7, this Court should dismiss Claim 7 without prejudice while authorizing an immediate appeal under Rule 54(b), Fed. R. Civ. P.

In their response, Home Builders argue that this Court put the proverbial cart-before-the-horse by not first addressing their Article III standing argument. Relying on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002), Home Builders argue that this Court must always consider an Article III standing

issue before addressing other jurisdictional issues or the merits of the case. They then, in great and expansive detail, rehash their standing arguments set forth in their previous briefs.

In its response, the USFWS notes that while it agrees that Court's June 2, 2003 Order is supported by Ninth Circuit case law, it recently realized that it had failed to raise a jurisdictional defect in its extensive briefing on Claim 7. Namely, the USFWS now argues that its December 3, 2002 Biological Opinion on the Effects of the Environmental Protection Agency's Transfer of its National Pollutant Discharge Elimination System program for Arizona to the State of Arizona (the "Transfer BO") is not a final agency action and is, thus, neither reviewable by this Court nor the Ninth Circuit. Thus, it requests that this Court dismiss Claim 7 with prejudice and enter Rule 54(b) language. USFWS's new-found argument is essentially that a biological opinion without an accompanying incidental take statement, like the Transfer BO in this case, does not carry the legal effect that the United States Supreme Court found dispositive in *Bennett v. Spear*, 520 U.S. 154 (1997). However, the USFWS also argues that if this Court finds that the Transfer BO is a reviewable final agency action, this Court should sever and transfer Claim 7.

Discussion

As an initial matter, the Court notes that the combination of Rule 21, Fed. R. Civ. P.,[1] and 28 U.S.C.

[1] Rule 21, Fed. R. Civ. P., provides that "[a]ny claim against a party may be severed and proceeded with separately."

§ 1631[2] allows this Court to sever and transfer Claim 7 to the Ninth Circuit while retaining jurisdiction over the remaining counts in Defenders' Second Amended Complaint. *See, e.g., United State* [sic] *v. County of Cook, Illinois*, 170 F.3d 1084, 1087-89 (Fed. Cir. 1999) *and Federal Deposit Ins. Corp. v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996).

Nonetheless, a case may be transferred under Section 1631 only when "(1) a court exists in which the case could have been brought originally, and (2) the interests of justice would be served by the transfer." *Clark v. Busey*, 959 F.2d 808, 812 (1992). In addition, a court must consider whether the action would have been timely filed if it had been filed in the proper forum on the date filed. *See Taylor v. Social Security Adm.*, 842 F.2d 232, 233 (9th Cir. 1988). Thus, "[t]ransfer is improper where the transferee court lacks jurisdiction and thus could not have originally heard the suit" because "Section 1631 does not itself establish jurisdiction, but rather corrects lack of jurisdiction only in cases that are actually transferred or are at least transferable." *Clark*, 959 F.2d at 812. *See also*

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[2] 28 U.S.C. § 1631 provides as follows:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Id.

Hose v. Immigration and Naturalization Serv., 180 F.3d 992, 996 (9th Cir. 1999). In addition, "[t]ransfer is also improper where the plaintiff fails to make a prima facie showing of a right to relief, because the interests of justice would not be served by transfer of such a case." *Clark*, 959 F.2d at 812.

Addressing the relevant factors, the Court reaffirms its June 2, 2003 Order (Doc. # 151) in which it found that jurisdiction over Claim 7 is proper *exclusively* in the Ninth Circuit in light of 33 U.S.C. § 1369(b)(1)(D), *Public Utility Comm'r of Oregon v. Bonneville Power Admin*, 767 F.2d 622, 626 (Cir. 1985), and the facts of this particular challenge. Furthermore, this challenge would have been timely filed if it had been filed in the proper forum on the date filed. *See, e.g.*, 28 U.S.C. § 2401(a) (providing a six-year statute of limitations) *and Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154, 1160-61 (D. Ore. 2001). Thus, this Court must address whether a transfer would be in the interests of justice and particularly the jurisdictional issues raised by the USFWS and the Home Builders.

With respect to Home Builders' jurisdictional arguments, the Court finds that they misread the relevant cases as neither *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) nor *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002) require a federal court to consider an Article III standing issue before addressing other jurisdictional issues. Rather, those cases merely indicate that a federal court must establish its *jurisdiction* before proceeding to the *merits* of a case. *See Steel Co.*, 523 U.S. at 101, *and Scott*, 306 F.3d at 653-54. In fact, the United States Supreme Court in *Steel* Co. recognized that a statutory standing question may be resolved *before* an Article III standing issue. *See Steel Co.*,

523 U.S. at 97 n.2. *See also, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-85 (1999) *and ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1140 (9th Cir. 1998) (noting that a decision of statutory standing may take priority over an issue of Article III standing). Thus, Home Builders' argument that a federal court *must* consider an Article III standing issue before addressing other jurisdictional issues is flatly wrong.

In this matter, this Court has not transgressed the dictates of either *Steel Co.* nor *Scott* in addressing first whether the Ninth Circuit is vested by Congress with exclusive jurisdiction to decide Claim 7. Rather, it has followed the binding cases and addressed a serious and substantial jurisdictional argument, which even the USFWS did not advocate by the time of oral arguments on Claim 7, and it has *not* addressed the merits of Claim 7. Rather, this Court's decision helps promote the underlying purpose of *Steel Co.* As the Supreme Court stated, "[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, 523 U.S. at 101. Both Congress and the Ninth Circuit have laid down limits on this Court's jurisdiction, which this Court must strictly observe, and Claim 7 is undoubtably [sic] beyond those limits.

Nonetheless, Home Builders' standing arguments may have some bearing with respect to whether a transfer under Section 1631 would be appropriate. After reviewing Home Builders' standing arguments, the Court notes that many, if not all, of these arguments are similar to standing arguments that could be made against Defenders'

challenge to the Environmental Protection Agency's ("EPA") approval of the State of Arizona's application to administer and enforce the NPDES program for Arizona which is currently pending before the Ninth Circuit. In addition, in reviewing the Ninth Circuit's docket on Defenders' challenge against the EPA (*see Defenders of Wildlife v. United States Environmental Protection Agency*, Ninth Circuit Case # 03-71439), the Court finds that the National Association of Home Builders has been granted leave to intervene in that challenge. Thus, this Court readily expects that either the Home Builders will raise or that the Ninth Circuit will *sua sponte* consider similar standing issues with respect to the EPA challenge. *See e.g.*, *Steel Co.*, 523 U.S. at 97 (noting that a court can raise jurisdictional issues *sua sponte*). Considering the fact that the Ninth Circuit has *exclusive jurisdiction* over this challenge to the Transfer BO and would have decided the Article III standing issues as a matter of first impression if Defenders had properly filed this claim in that court, and considering the potential of duplication and inconsistent results on the standing issues (*see, e.g.*, June 2, 2003 Order (Doc. # 151), p. 940), the Court believes it appropriate to allow the Ninth Circuit to address these issues as a matter of first impression. Nonetheless, at the very least, the Court finds that Defenders' standing arguments are not "sure losers." *See, e.g., Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999). Thus, this Court believes that it would be in the interest of justice to transfer Claim 7 to the Ninth Circuit without resolving the Article III standing issues raised by Home Builders.

With respect to the USFWS' jurisdictional argument that a biological opinion without an accompanying incidental take statement, like the Transfer BO in this

case, does not carry the legal effect that the United States Supreme Court found dispositive in *Bennett v. Spear*, 520 U.S. 154 (1997), the Court also finds that Defenders' position is also not a "sure loser." *See Cascadia Wildlands Project v. U.S. Fish & Wildlife Serv.*, 219 F.Supp.2d 1142, 1147-48 (D. Ore. 2002) citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Pacific Coast Fed'n of Fishermen's Assoc., Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028 (9th Cir. 2001). *See also* USFWS' June 30, 2003 Response (Doc. # 170) at 1 n.2 ("In Plaintiffs' lawsuit against EPA in the Ninth Circuit, judicial review may properly include a review of the reasonableness of EPA's reliance on the analysis and recommendation of FWS' Biological Opinion in order to determine whether EPA fulfilled its obligations under § 7(a)(2) with respect to the approval of the Arizona program."). Thus, similarly, this Court believes that it would be in the interest of justice to transfer Claim 7 to the Ninth Circuit without resolving the statutory standing issue raised by the USFWS.

Finally, taking an obligatory peek at the merits of Defenders' Claim 7, the Court does not believe that Claim 7 is a "sure loser" such that a transfer would not be in the interests of justice. *See, e.g., Phillips*, 173 F.3d at 611 *and Clark*, 959 F.2d at 812. As such, the Court believes that a transfer of Claim 7 to the Ninth Circuit would be in the interests of justice. Accordingly, the Court finds that it is appropriate to sever Claim 7, pursuant to Rule 21, Fed. R. Civ. P., and transfer that claim to the Ninth Circuit, pursuant to 28 U.S.C. § 1631, while retaining jurisdiction in this Court over Defenders' remaining claims.

Conclusion

Accordingly, IT IS HEREBY ORDERED that:

1. Claim 7 of Plaintiffs' Second Amended Complaint is SEVERED from Plaintiffs' remaining claims, and TRANSFERRED to the United States Court of Appeals for the Ninth Circuit;

2. The Clerk of the Court SHALL FORWARD a copy of this Order, this Court's June 2, 2003 Order (Doc. # 151), and a copy of Plaintiffs' Second Amended Complaint (Doc. # 42) to the Ninth Circuit;

3. The Ninth Circuit is ADVISED that this matter is a related case to the pending matter *of Defenders of Wildlife v. United States Environmental Protection Agency*, Ninth Circuit Case # 03-71439; and

4. If any party or intervenor wishes additional portions of this Courts record to be forwarded to the Ninth Circuit, it shall prepare a motion and/or stipulation along with a proposed form of order that clearly indicates which *specific* portions of the record it wishes forwarded to the Ninth Circuit. Such motion and/or stipulation along with a proposed form of order shall be submitted to the Court within ten (10) business days of the entry of this Order.

DATED this 15th day of July, 2003.

/s/ Cindy K. Jorgenson
CINDY K. JORGENSON
United States District Judge

[SEAL] **U.S. Department of Justice**
Environment and Natural Resources Division

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July 27, 2005

By Overnight Delivery

Ms. Cathy A. Catterson
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street,
San Francisco, CA 94119-1526

Re: Nos. 03-71439, 03-72894; *Defenders of Wildlife v. Environmental Protection Agency*

Dear Ms. Catterson:

On July 26, 2005, Respondents received Petitioners' letter regarding supplemental authority regarding this Court's recent decision in *Washington Toxics Coalition v. Environmental Protection Agency,* 2005 U.S. App. Lexis 12898, June 29, 2005. The issue discussed by Petitioner regarding whether or not the United States Environmental Protection Agency ("EPA") has an obligation to consult regarding its approval of the State of Arizona's Clean Water Act ("CWA") 402 Permitting Program is not before the Court in this case. In *Defenders of Wildlife v. Environmental Protection Agency,* EPA did consult. The only issue before this Court is the adequacy of that consultation. For the same reason, the Court should not reach the question regarding whether the EPA has sufficient discretion to trigger

consultation regarding the approval of the transfer of 402 permitting authority to the State. If the Court were to believe that it is necessary to resolve the "discretion" issue, Respondents reiterate their request at oral argument for an opportunity to provide the Government's views on that issue.

Thank you for your assistance in providing this response to the above-captioned panel.

Very truly yours,

/s/ Robert L. Gulley
Robert L. Gulley

cc: Counsel of Record

[SEAL] **U.S. Department of Justice**

Environment and Natural Resources Division

Wildlife and Marine Resources Section
P.O. Box 7369
Ben Franklin Station
Washington, DC 20044-7369
[Telephone Numbers Omitted In Printing]

August 4, 2005

By Overnight Delivery

Ms. Cathy A. Catterson
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street,
San Francisco, CA, 94119-1526

Re: Nos. 03-71439, 03-72894; *Defenders of Wildlife v. Environmental Protection Agency*

Dear Ms. Catterson:

I am writing with respect to the above-captioned matter to provide the panel with the following supplemental information. On August 3, 2005, the United States Fish and Wildlife Service published in the Federal Register a proposed rule to delist the pygmy owl. Endangered and Threatened Wildlife and Plants; Proposed Rule To Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-Owl From the Federal List of Endangered and Threatened Wildlife; Proposal To Withdraw the Proposed Rule To Designate Critical Habitat, 70 Fed. Reg. 44547-01 (Aug. 3, 2005). The pygmy owl is the species of primary concern in this case.

Thank you for your assistance in providing this response to the above-captioned panel.

Very truly yours,

/s/ Robert L. Gulley
Robert L. Gulley

cc: Counsel of Record

[SEAL] **U.S. Department of Justice**

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August 4, 2005

By Overnight Delivery

Ms. Cathy A. Catterson
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street,
San Francisco, CA 94119-1526

Re: Nos. 03-71439, 03-72894; *Defenders of Wildlife v. Environmental Protection Agency*

Dear Ms. Catterson:

On July 15, 2005, Petitioners notified the Court of supplemental authority regarding this Court's recent decision in *Washington Toxics Coalition v. Environmental Protection Agency,* 2005 U.S. App. Lexis 12898, June 29, 2005. Respondents and Intervenor-Defendants filed their responses as allowed by CR 28(j). On August 1, 2005, Petitioners filed a reply to the Intervenor-Defendants response. Such replies are not allowed by CR 28(j) or any other Circuit Rule. Accordingly, such a reply should be ignored by the Court. To the extent that the Court is going to consider Petitioners' reply, Respondents again emphasize that the issue of whether or not the United States Environmental Protection Agency ("EPA") can properly rely on 50 C.F.R. § 402.03 in deciding whether or not it must consult regarding its approval of the State of

Arizona's Clean Water Act 402 Permitting Program is not before the Court in this case because EPA did consult regarding the approval of the program.

Thank you for your assistance in providing this response to the above-captioned panel.

Very truly yours,

/s/ Robert L. Gulley

Robert L. Gulley

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Ms. Karen Smith
Director, Water Quality Division
Arizona Department of Environmental Quality
1110 W. Washington
Phoenix, AZ 85007

Re: Statutory Deadline for Arizona NPDES Program Submission

Dear Ms. Smith:

This letter summarizes the discussions between ADEQ and EPA staff regarding the starting date of EPA's 90 day review of Arizona's NPDES program submission. During these discussions EPA and ADEQ agreed that the appropriate start date was July 10, 2002 when EPA received the final supplement to Arizona's NPDES program application. Therefore, EPA and ADEQ are in agreement that EPA's deadline for taking action on Arizona's submission is October 8, 2002. We look forward to continue working with you during the review process.

Sincerely,

/s/ Alexis Strauss
Alexis Strauss, Director
Water Division 17 Sept. 2002

[Image Omitted In Printing]

Michael Horton
10/15/2003 02:30 PM

To: Susan MacMullin/RO/R2/FWS/DOI@FWS

cc:

Subject: indirect effects

— Forwarded by Michael Horton/ARL/R0/FWS/DOI on 10/15/2003 04:30 PM —

Sherry Barrett
07/25/2002 08:04 PM

To: Michael Horton/ARL/R9/FWS/DOI@FWS

cc: Cindy Schultz/R0/R2/FWS/DOI@FWS

Subject: indirect effects

Michael:

1. We are hearing from EPA that we don't need to address the indirect effects of their delegation of the NPDES permit program to the State of AZ because we can still address effects through section 9. However, one of our species of concern is a plant (Pima pineapple cactus) and the other is the pygmy-owl. For the latter, we only have a handful left, and, therefore, section 9 doesn't play well Section 9 is simply not equivalent to the threshold of "may adversely affect." The Congressional language speaks to the fact that the burdon [sic] of the ESA is on the shoulders of the Feds, not the private landowners.

2. "Caused by" and "but for" are not the same. The former regards an effect that is caused by an action. With the latter, we're looking to see if there was another

potential cause for an action. If there is not, then it is an interrelated or interdependent action.

Sherry
Michael Horton

[Image Omitted In Printing]

Michael Horton
07/23/2002 01:57 PM

To: Larry Salata, David Wright, Alison Willy@FWS, Cindy Schultz@FWS, Sherry Barrett@FWS, Jennifer Szymanski@FWS, Glenn Smith, Steve Spangle@FWS

cc:

Subject:

One thing is clear from my request for help: there is a basic lack of understanding throughout the Service as to what indirect effect are.

While I got some good examples of indirect effects and a subset of these made good points about how using the "but for" test would create a problem for us, none of them resulted in a slap you in the face "that's outrageous" result. Here's what I need: a solid response for the argument that if we remove the indirect effects from the action agency by utilizing the "but for" test, that it doesn't really matter because the nonFederal entity still has the section 9 prohibition.

Several ground-rules:

(1) Yes, the "but for" test is only used within the preamble to identify interrelated and interdependent actions, however, the lawyers feel that this is also the test that should be used to identify causation;

(2) We can't use the argument that we just don't enforce section 9 or that it's much harder to make a section 9 case than it is to address the effects in section 7 (this is what they're banking on);

(3) In her email message Sherry stated that she believes that if you receive Federal funding/assistance/permits, etc. this comes with the baggage of Federal laws and responsibilities meant to protect the environment, regardless of whether there is another way to do it. This argument rings true to me. Though I don't want to limit our approach to just one argument, I'd like to develop this argument further with any other examples that people can think of where this is true (they don't have to be limited to environmental laws or constraints) and any other thoughts we can role [sic] into it (e.g., section 7 is designed to keep the Federal government from participating in actions that lead to the demise of the species).

If we can't figure out a solid response for this argument, I think we'll lose indirect effects as we know them.

Thanks for your time and any ideas you can provide,

Mike

P.S. – If there's anyone else who might have some good insights, please feel free to forward this on.

United States Department of the Interior
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210 FAX: (602) 242-2513

In Reply Refer To:
02-21-02-F-0268 November 27, 2002

Mr. Terry Oda
Clean Water Act Standards and Permits Office (WTR-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Dear Mr. Oda:

As discussed in conversation between our respective staffs, the U.S. Fish and Wildlife Service, Arizona Ecological Services Office, is transmitting the enclosed revised draft biological opinion on the transfer of the National Pollutant Discharge Elimination Program (NPDES) to the State of Arizona. We will finalize the document after you have notified us that you have reviewed it and there are no errors and no need for further clarification.

We encourage you to coordinate the review of this project with the Arizona Department of Environmental Quality (ADEQ) and the Arizona Game and Fish Department (cc without enclosure: John Kennedy, Habitat Branch). However, please note that draft documents generated under the ESA section 7 consultation process are generally not released until after a final biological opinion has been issued, so as not to discourage frank discussion between the parties involved [Freedom of Information Act (FOIA), exemption 5]. If the Environmental Protection Agency (EPA) chooses to release this draft biological opinion to non-Federal parties, it may become part of the public

record and may no longer be determined to be exempt from FOIA.

We have addressed EPA's comments on the first draft Biological Opinion (BO). First, the draft BO now provides a clear summary of the information on which the opinion is based. See paragraph two, page one for the inserted text. Second, regarding 50 CFR 402.14(h)(2) and (h)(3), we have adequately summarized the effects of the action on listed species and critical habitat. Due to the legal complexity of this opinion, much of the biological information has been referenced at our website: http:// arizonaes.fws.gov. We also believe that the biological effects of this action will be minimal due to the administrative nature of the proposed action. We have amended our effects section to describe why we believe there are minimal biological effects in this action and to explain our position more clearly. Third, we have added a detailed discussion of the proposed action which provides a more detailed explanation of the basis of our conclusion. Fourth, we have added clarification to our opinion at EPA's request that the species and critical habitats under consideration in this consultation are those that are in, adjacent to, or dependent on surface waters in Arizona. We emphasize that in EPA's Biological Evaluation, you concluded that all listed species and critical habitat in Arizona are in, adjacent to, or dependent on surface waters in Arizona. We have also more clearly described how to access our website and obtain more species and critical habitat information. Fifth, we have added language throughout the opinion discussing critical habitat, so as not to infer that we are only analyzing the effects of the action on listed species alone. Sixth, we have moved our discussion from the introduction section to the

consultation history. We also kept the language discussing the issue of funding ADEQ's NPDES program for the next three years.

Most of EPA's specific comments were addressed directly and changed as EPA suggested. The 'Conservation Measures' section was replaced by more detailed language in the description of the proposed action.

If we can be of further assistance, please contact Carrie Marr (x214) or Debra Bills (x239).

Sincerely,

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

Enclosure

cc with enclosure:
Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Assistant Field Supervisor, Ecological Services, Tucson, AZ

without enclosure:
Karen Smith, Water Division, Arizona Department of Environmental Quality, Phoenix, AZ
John Kennedy, Habitat Branch, Arizona Game and Fish Department, Phoenix, AZ

W:\Carrie Marr\az npdes bo\azpdestransmittal2.wpd